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Steven F. Friedell

Rutgers University (Camden)

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The "Different Voice" in Jewish Law: Some Parallels to a Feminist Jurisprudence†

STEVEN F. FRIEDEL*

INTRODUCTION

Feminism and all feminist scholarship must address a central question: Are women different from men?¹ Some feminists insist that women and men are virtually the same and that the law should treat women the same as men.² The Equal Pay Act³ and Title VII⁴ are based on the assumption that women are the same as men or at least ought to be treated as if no essential differences exist between them. Other feminists focus on Carol Gilligan's highly influential book, *In a Different Voice*, which suggests that women tend to develop a distinct set of moral standards. Women, according to Gilligan, see moral issues not in terms of rights and rules but in terms of relationships and responsibilities.⁵ Women develop a moral imperative

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* Professor of Law, Rutgers University (Camden). B.A., 1971, Brandeis University; J.D., 1974, The University of Michigan. The author wishes to thank N.E.H. Hull for her help and encouragement and Donna Correll, Arnold Enker, Ann Freedman, Ellen Friedell, Kodzo Kludze, Rabbi Allan Lazaroff, Michael Livingston, Craig Oren, Aviva Orenstein, and Allan Stein for their helpful comments on earlier drafts of this Article. Thanks are also due to my students in the seminar on Jewish law, especially to Ruth Anne Eisenberg, for stimulating discussions on this topic.

Many of the sources on Jewish law cited in this Article are not available in translation. The more important sources referred to in this Article that have been translated are THE BABYLONIAN TALMUD (I. Epstein ed. 1935); THE CODE OF MAIMONIDES (1949); THE MINOR TRACTATES OF THE TALMUD (1965). The Jerusalem Talmud is translated in a series called THE TALMUD OF THE LAND OF ISRAEL (1982-1991). Genesis Rabbah and Leviticus Rabbah are translated in MIDRASH RABBAH (1983). The most useful secondary source is THE ENCYCLOPAEDIA JUDAICA (1972). For an overview of the development of Jewish law and its sources, see Rosenberg & Rosenberg, *In the Beginning: The Talmudic Rule Against Self Incrimination*, 63 N.Y.U. L. Rev. 955, 966-874 (1988). Two useful bibliographies of English materials are N. RAKOVER, THE MULTI-LANGUAGE BIBLIOGRAPHY OF JEWISH LAW (1990) and P. WEISBARD & D. SCHONBERG, JEWISH LAW: BIBLIOGRAPHY OF SOURCES AND SCHOLARSHIP IN ENGLISH (1989). For a description of traditional Jewish faith and practice, see H. WOUK, THIS IS MY GOD (1959).

1. See Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

2. B. FRIEDAN, *THE FEMININE MYSTIQUE* (1963); BROWN, EMERSON, FALK & FREEDMAN, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971); see also FRUG, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U.L. REV. 1065, 1104 (1985) (Gender distinctions do not accurately describe people as women and men.).

3. 29 U.S.C. § 206 (1988).

4. 42 U.S.C. § 2000d (1988).

5. C. GILLIGAN, *IN A DIFFERENT VOICE* 100 (1982); see also N. NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* 24-25 (1984).

of caring and strive to alleviate the trouble of the world. Women are more likely than men to fear competitive situations and impersonal achievement.⁶ Gilligan also suggests that women are more likely to develop in this way because in early childhood most girls and boys are raised primarily by mothers. Boys therefore learn to develop a sense of themselves as separate individuals whereas girls develop a sense of relatedness.⁷

A number of people in the legal world have reacted to Gilligan's thesis by suggesting ways in which law should change by incorporating her insights.⁸ Legal procedures and substantive law would be restructured radically to resolve legal disputes more informally. Such a system would place less emphasis on rules and precedents and place more emphasis on trying to mend the relationships of the parties.⁹ Rather than search for a rule applicable to all situations, judges ought to encourage solutions based on the particular contexts and relationships.¹⁰ There should be greater emphasis on mediation and encouraging parties to work out their differences after coming to see the other's point of view.¹¹ Judges should be less disinterested and more connected to the parties and society.¹² Lawyers would be less likely to adopt the advocacy model and would be more concerned with

6. C. GILLIGAN, *supra* note 5, at 42.

7. *See id.* at 7-9.

8. *See, e.g.,* Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Cahn, *A Preliminary Feminist Critique of Legal Ethics*, 4 GEO. J. LEGAL ETHICS 23 (1990); Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Freedman, *Feminist Legal Method in Action: Challenging Racism, Sexism and Homophobia in Law School*, 24 GA. L. REV. 849 (1990); Heilbrun & Resnik, *Convergences: Law, Literature, and Feminism*, 99 YALE L.J. 1913 (1990); Karst, *Woman's Constitution*, 1984 DUKE L.J. 447; Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL EDUC. 243 (1988); West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); Worden, *Overshooting the Target: A Feminist Deconstruction of Legal Education*, 34 AM. U.L. REV. 1141 (1985).

Gilligan has also had her share of critics. Some have feared that Gilligan's analysis would further stereotype women. *See* Williams, *supra* note 1. Others argue that women's "different voice" is a product of male oppression of women. *See* C. MACKINNON, *FEMINISM UNMODIFIED* 38-39 (1987). MacKinnon says that men expect women to care for them and that reifying the damage of sexism into differences is an insult to women's possibilities. *Id.* Other feminists assume that both men and women are freely capable of speaking in the different voice. *See* Frug, *supra* note 2. Others have criticized the validity of Gilligan's findings. *See, e.g.,* Auerbach, Blum, Smith & Williams, *Commentary on Gilligan's In a Different Voice*, 11 FEMINIST STUD. 149 (1985); Nails, *Social-Scientific Sexism: Gilligan's Mismeasure of Man*, 50 SOC. RES. 643 (1983). Despite such criticism, many feminists have adopted the Gilligan model as a normative model. *See* Bartlett, *supra*, at 849.

9. *See* Menkel-Meadow, *supra* note 8, at 52-53.

10. Sherry, *supra* note 8, at 582-83.

11. *See* Menkel-Meadow, *supra* note 8, at 52.

12. *See* Heilbrun & Resnik, *supra* note 8, at 1949-51.

trying to aid the clients at arriving at a healthy solution to their problems.¹³ Feminist jurisprudence would change tort law by deemphasizing the award of damages. Instead, it would stress the need to prevent people from hurting others and would impose duties on people who injure others to take active responsibility for repairing that injury.¹⁴ As applied to business practices, one would expect that a feminist jurisprudence would discourage cutthroat competition and would encourage concern for one's customers, dealers, and competitors.

The student of Jewish law probably recognizes that many of these suggestions stemming from the work of Gilligan and others for reform of the Anglo-American legal system exist in Jewish law as it developed in the Talmud and post-Talmudic sources.¹⁵ This Article will examine many of the similarities. The presence of these similarities would be worthwhile if only to elucidate the connection within Jewish law of a variety of seemingly unrelated procedural and substantive rules and practices. But their presence in Jewish law may also be of value to individuals concerned with defining and formulating a feminist critique of current Anglo-American jurisprudence. Some fear that Gilligan's approach could reinforce a stereotype of women that might make it more difficult for them to advance in society. Men would be able to justify their refusal to hire or promote women into traditional male positions on the grounds that women are naturally unsuited for those roles.¹⁶ One response is to assert that the legal system ought to

13. Menkel-Meadow, *supra* note 8, at 53.

14. Bender, *supra* note 8, at 37.

15. This point is mentioned by George Fletcher in the context of his discussion of the Jewish law of care for others illustrated by the Jewish law of rescue. Fletcher, *Ho and Halakha*, 1 S'VARA 13, 14 (1990); see also M. SAMUEL, *THE GENTLEMAN AND THE JEW* (1950) (contrasting the English gentlemen's "sporting formulation of life" to Judaism's moral approach).

The Babylonian Talmud consists of two parts, the Mishna, which was compiled in Palestine about the year 200 of the Christian Era, and the Gemara, which was completed in Babylonia about 300 years later. The other main sources used in this Article are three codes: the Mishneh Torah written by Maimonides (circa 1135-1204) the Tur written by Jacob ben Asher (circa 1270-1343), and the Shulhan Arukh written by Joseph Caro (circa 1488-1575). Each of these sources is heavily supplemented by commentaries. The most important Talmudic commentaries used in this Article are Rashi (circa 1040-1105), and the Tosafot, which is a collection of dialectical comments on the text dating primarily from the 12th to the 14th centuries. Another important kind of source used in this Article is the responsa literature, the case law of Jewish jurisprudence.

Another work, known as the Palestinian Talmud or the Jerusalem Talmud, consists of the Mishna with a Gemara that was completed in Palestine about 100 years before the completion of the Babylonian Talmud. Unless otherwise indicated, all references in this Article to the "Talmud" are references to the Babylonian Talmud.

Translations of passages in the Talmud that appear in this Article are based on *THE BABYLONIAN TALMUD* (I. Epstein ed. 1935). Unless otherwise indicated, translations of other material are by this author.

16. See Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103

value women's insights into moral problems and yet be vigilant against using those insights to discriminate against women.¹⁷ But this response is less than persuasive. There is no guarantee that women will not be further stereotyped if Gilligan's theory is widely accepted.

The insights to be gained from Jewish law may be important to avoid this stereotyping of women. Although Jewish law was developed almost entirely by men,¹⁸ it nevertheless incorporated many of the ideals and approaches that feminists of the Gilligan school would favor. This suggests that the values of responsibility and caring are not necessarily the province of women alone and are therefore not necessarily the result of an innate psychology of young girls. American culture may have conditioned a disproportionate number of women into adopting an ethic of caring and discouraged a disproportionate number of men from adopting such an ethic. But if so, the example of Jewish law would suggest that there is nothing natural or inevitable in this process. Therefore, adoption of these goals by feminists ought not stereotype women. And feminists who feel ambivalent about proposing legal reforms that respond to the "different voice" can take comfort in knowing that they are not alone in favoring law that would promote responsibility and caring.

It may strike many as odd that Jewish law would offer insights and values that parallel those of feminists. For Jewish law, although it values and protects women, generally subordinates them.¹⁹ But when we examine aspects of Jewish law that lie outside the regulation of relationships between the sexes—such as matters of dispute resolution, legal representation, judicial procedure, and substantive law relating to injuries and competition—we see that Jewish law has much in common with the feminist approach.

The point of this Article is not to suggest that Jewish law is the only source that parallels a feminist jurisprudence. Many of the values in feminist jurisprudence may be found in any society that emphasizes the individual's obligations to the community substantially more than American society

HARV. L. REV. 1749 (1990); Williams, *supra* note 1. The concern is raised in part by cases like EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988) (small number of women employed in commission sales jobs is not due to unlawful discrimination but can be explained in part by tendency of women to prefer jobs that do not involve cutthroat competition).

17. See Bender, *supra* note 8.

18. Women made a few contributions to the development of Jewish law. For example, Beruryah, a woman in the second century, was an authority whose views on Jewish law and thought were quoted approvingly in the Talmud and other sources. TOSEFTA *Kelim Bava Metzia* 1:6; TALMUD *Berakhot* 10a. Jewish women are credited with having imposed stricter requirements on the delay required before going to the ritual bath after a period of menstruation. TALMUD *Niddah* 66a.

19. See *infra* notes 181-92 and accompanying text.

does. For example, Amish custom and practice,²⁰ customary African law,²¹ and the law of some villages in colonial China²² exhibit many of these same points. The primary reason for focusing on Jewish law is its extensive written record, produced over the last two thousand years and covering virtually every aspect of daily life in many countries and a variety of cultures. That record not only preserves for us the voices of scholars long since past but allows us to see the development, and in some cases the decline, of the values of responsibility and caring. The conclusion of this Article will discuss some of the implications of this similarity for Jewish law and feminist jurisprudence.

ASPECTS OF JEWISH LAW

I. *Compromise and Mediation*

A common misperception of Jewish law is that it is overly legalistic. Many assume that Talmudic law consists of many technical rules that are developed without regard to justice.²³ The study of Jewish law can often be highly technical and abstract. In the Talmudic period, roughly from the beginning of the Christian Era to the year 500, certain rabbinical academies employed rigorous study methods that often involved impractical hypothetical situations.²⁴ During the medieval period rabbis developed a study method known as "pilpul," based on a word meaning "pepper." This method often involves hair-splitting analysis,²⁵ hardly the sort of approach favored by a feminist jurisprudence.²⁶

20. See J. HOSTETLER, *AMISH SOCIETY* (3d ed. 1980). In Amish society members are expected to know one another's problems and work to settle them, *id.* at 16-18; individuals are expected to submit to the community will, *id.* at 85-86; members are not supposed to go to court, *id.* at 252; and mutual aid is important, *id.* at 246.

21. T. ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* 130, 272 (1956).

22. See Karst, *supra* note 8, at 490 n.166.

23. See, e.g., *City of New York v. United States Dep't of Commerce*, 739 F. Supp. 761, 770 (E.D.N.Y. 1990); *People v. Joyce*, 126 Ill. 2d 209, 533 N.E.2d 873, 879 (1988) (Clark, J. concurring); *Watson v. Commonwealth*, 579 S.W.2d 103, 104 (Ky. 1979); *People v. Barysh*, 95 Misc. 2d 616, 408 N.Y.S.2d 190 (N.Y. Sup. Ct. 1978); N. MORRIS, *MADNESS AND THE CRIMINAL LAW* 66 (1982); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 396 (2d ed. 1988); see also *Commercial Discount Corp. v. King*, 552 F. Supp. 841, 848 (N.D. Ill. 1982) (comparing intellectual fascination of choice of law analysis to "pilpul" and warning about the need to "avoid the trap of applying mechanistic rules").

24. For example, to determine if he deserved to be considered a scholar, Rabbi Dimi was asked, "If an elephant swallows an osier basket and passes it out with its excrement, is it still subject to ritual uncleanness?" TALMUD *Bava Batra* 22a.

25. See 13 *ENCYCLOPAEDIA JUDAICA Pilpul* 524 (1972). Herman Wouk's character I. David Goodkind describes the study of Talmud this way:

[U]nder the opaque Aramaic surface the Talmud is a magnificent structure of subtle legal brilliancies, all interwoven with legend, mysticism, the color of ancient times, and the cut-and-thrust of powerful minds in sharp clash. I can't get enough of it, and I've been at it for decades.

H. WOUK, *INSIDE, OUTSIDE* 4 (1985).

26. See, e.g., Freedman, *supra* note 8, at 850 (Feminist method destroys artificial dichotomies and rejects abstraction.).

The hair-splitting analysis, which is a feature of the study of Jewish law, is not a feature of its practice in litigated cases. Because Judaism views the Torah²⁷ as the will of God, the study of the Torah takes on a religious dimension akin to prayer.²⁸ Pilpul, developed as the study of that law, almost became an end in itself.²⁹ Pilpul also helped the rabbis keep the study fresh and harmonize seemingly contradictory statements in the law.³⁰

By contrast, when rabbis applied Jewish law to the resolution of civil disputes, they were not concerned with theoretical niceties. Instead, they emphasized compromise. If parties failed to resolve their dispute by reaching a settlement, the rabbis or others within the community would attempt to mediate the dispute.³¹ If this failed to bring about a settlement, the law required the judges or arbitrators to encourage the litigants to authorize the panel to decide the case according to the method of compromise rather than strict law.³² The method of compromise meant that the court would decide the dispute through the exercise of discretion.³³ The court would, in effect, resolve the dispute in a way that the parties might have resolved it

27. "Torah" is understood within the Jewish tradition to refer not only to the five books of Moses, but also to the oral law, which is reflected in part in the Mishnah, Talmud, and later sources. See TALMUD *Berakhot* 5a, translated *infra* note 126.

28. See, e.g., TALMUD *Berakhot* 8a (One ought to pray where one studies Torah, because after the destruction of the Temple the only place that God has in this world is the four cubits of the law.); TALMUD *Berakhot* 21b (One who teaches his son Torah is regarded as though he had received it at Sinai.).

29. Professor Judith Plaskow correctly senses that Jewish law "has its religious origins in the passion for relation" but criticizes that law for its attention to the alternate reality that it creates. J. PLASKOW, *STANDING AGAIN AT SINAI: JUDAISM FROM A FEMINIST PERSPECTIVE* 68-70 (1990). She says, for example, "[I]n terms of the little girl penetrated before age three, what is her horror and pain next to the question of how her marriage contract should be written?" *Id.* at 70. Plaskow supports her criticism by reference to the writings of one of the great Halakhic authorities of our time, Rabbi Joseph Soloveitchik. In Soloveitchik's view, a person steeped in Jewish law is a person whose primary goal is to see the world in categories and concepts fashioned by the theoretical law. Such a person is less concerned with rendering rulings based on that law. See J. SOLOVEITCHIK, *HALAKHIC MAN* 19-29 (1983). Plaskow is right that the study of Jewish law can lead to the creation of an alternate reality. But as Soloveitchik observed, a rabbi is sometimes compelled "to render practical decisions." *Id.* at 24. And in its application to actual contested disputes, Jewish law displays most clearly its concern for fostering relationships and community.

30. 13 *ENCYCLOPAEDIA JUDAICA* *Pilpul* 524, 525 (1972).

31. Jewish tradition traced the mediation process back to Aaron, the first High Priest. See *ETHICS OF THE FATHERS* 1:12. It was said that when people quarrelled Aaron would go to each of them and say how much the other regretted the argument. He would sit with them until he had removed all rancor from their hearts. *THE FATHERS ACCORDING TO RABBI NATHAN* ch. 12; *PEREK HA-SHALOM* para. 18. He reconciled so many husbands and wives that legend says that 80,000 children were named after him. See 3 L. GINZBERG, *THE LEGENDS OF THE JEWS* 329 (1954).

32. See *SHULHAN ARUKH Hoshen Mishpat* 12:20. A court is praised if it always decides cases based on compromise. *MISHNEH TORAH Sanhedrin* 22:4; *SHULHAN ARUKH Hoshen Mishpat* 12:2. One authority wrote that a court is only praised if it renders a decision according to compromise. *RESPONSA SIMEON BEN ZEMAH DURAN* (circa 1361-1444) 1:47.

33. 5 *ENCYCLOPAEDIA JUDAICA* *Compromise* 857 (1972).

had the parties been able to negotiate a compromise.³⁴ The reason for this practice was the belief that a decision under strict law could lead to justice but not to peace;³⁵ a decision that left one side losing everything would not restore peace to the parties or the community. Peace and justice would be possible only if the parties could each leave the court or arbitration with a sense of having been treated fairly.³⁶

The development of this attitude in Jewish legal culture was not without dissent. There were apparently efforts in the Talmudic period to dilute the effect of the commandment of judging according to compromise.³⁷ Each rabbi implemented the practice differently. Also, because the method of compromise could not be imposed on the parties against their will,³⁸ a single litigant could always insist on a judgment according to strict law. But the strong preference of the Jewish legal system in the post-Talmudic period was to avoid a formal trial according to strict law, and rabbis could often

34. In one of his recollections of his father's decisions, Isaac Bashevis Singer tells how his father once heard a complicated case involving a large sum of money. Deciding the case according to the principle of compromise, his father ordered an equal division, "his old and tried formula." At first both sides derided the decision, but they soon agreed to accept it, shook hands, and "were the best of friends." I. SINGER, IN MY FATHER'S COURT 40-41 (1966). As Singer says, "The concept behind [the Jewish court] is that there can be no justice without godliness, and that the best judgment is one accepted by all the litigants with good will and trust in divine power." *Id.* at viii. For a discussion of modern day rabbinical courts, see Note, *Rabbinical Courts: Modern Day Solomons*, 6 COLUM. J.L. & SOC. PROBS. 49 (1970).

35. TALMUD *Sanhedrin* 6a. The Talmud says that Jerusalem was destroyed only because people insisted on strict law. TALMUD *Bava Metzia* 30b. The Midrash teaches that God created the world with the attributes of compassion and strict justice and that had it been created with strict justice alone the world would not be able to stand. GENESIS RABBAH 12:15. God is said to pray that His compassion will overcome His anger and that He will do more than strict justice would allow. TALMUD *Berakhot* 7a. God is said to have made a compromise between Isaiah and Hezekiah. TALMUD *Berakhot* 4b. Even Moses is said to have decided cases according to compromise and to have appointed judges based in part on their ability to decide cases by compromise. See 3 L. GINZBERG, *supra* note 31, at 67; J. LAUTERBACH, MEKILTA DE-RABBI ISHMAEL 182 (1933). The rabbis also valued the compromise of disputes about proper ritual as a way of promoting "peace between the scholars" and thereby preventing the development of factions. See, e.g., TALMUD *Berakhot* 39b.

36. See A. KIRSCHENBAUM, EQUITY IN JEWISH LAW: HALAKHIC PERSPECTIVES IN LAW 142-43 (1991); SHIUREI HARAV: A CONSPECTUS OF THE PUBLIC LECTURES OF RABBI JOSEPH B. SOLOVEITCHIK 82 (J. Epstein ed. 1974) [hereinafter SHIUREI HARAV].

37. The Talmud records different points of view. Rabbi Eliezer, son of Rabbi Jose the Galilean, said that it was forbidden for a court to compromise and that a court ought to let the "law cut through the mountain." By contrast, Rabbi Joshua ben Korcha said that it was a commandment to try a case by compromise. A third anonymous rabbi took the intermediate position that it was optional for a court to try a case by compromise. An additional view was that a court could try the case by compromise only until the judges had formed an opinion as to which side would win according to the strict law. The Talmud concludes its discussion by suggesting that the law follows Rabbi Joshua ben Korcha, but this is interpreted to mean only that at the beginning of a case the judge must ask the parties if they want their case resolved by strict law or by compromise. TALMUD *Sanhedrin* 6b-7a.

38. In order for a decision by compromise to be binding on the parties, the parties had to enter into an agreement authorizing the court to proceed on that basis. SHULHAN ARUKH *Hoshen Mishpat* 12:7.

exert a great deal of moral persuasion to make the litigants agree to submit their case for judgment based on compromise.³⁹

Compromise was especially encouraged where the law or facts were unclear⁴⁰ or where a party would be subject to an oath.⁴¹ Even if the parties had submitted their case for resolution according to strict law, they could change their minds and have it resolved by compromise up until the moment when the verdict was announced.⁴² And even after a verdict was announced in a case tried according to strict law, members of the community⁴³ or possibly even one of the judges who tried the case⁴⁴ could try to persuade the parties to accept a compromise.

The resolution of a case by compromise resembled superficially the approach of many modern American courts of favoring out-of-court settle-

39. Joshua Falk emphasized that the judges are supposed to explain to the litigants that it would be better for them to have the case decided by compromise, and the judges are to "speak to their hearts" in the hopes that they will agree to that mode of trial. MEIRAT EINAYIM TO SHULHAN ARUKH *Hoshen Mishpat* 12 n.6.

The standard submission agreements used by Jewish arbitrators have usually included a provision granting the arbitrators the power to resolve the disputes according to compromise. See H. GULAK, OZAR HA-SH'TAROT 281-86 (1926), translated in E. DORFF & A. ROSETT, A LIVING TREE 295-98 (1988). For a recent example of such an agreement, see Elmora Hebrew Center, Inc. v. Fishman, 239 N.J. Super. 229, 232 n.2, 570 A.2d 1297, 1298 (App. Div. 1990), *aff'd* 125 N.J. 404, 593 A.2d 725 (1991). According to the English translation prepared by the rabbinical tribunal, the submission agreement authorized the panel of rabbis to "adjudicate between us according to their judicious wisdom," and the parties agreed to accept the panel's judgment "whether it be verdict or compromise." (The Hebrew original executed by the parties contained the ancient formula "whether by strict law or by compromise close to strict law."): The case involved a congregation's effort to discharge its rabbi based on serious charges of impropriety. The panel decided in accordance with the principle of compromise. It awarded the rabbi damages, but although it found no grounds for the rabbi's removal from the congregation, "for the sake of peace" it concluded that he should leave his position within two months after being paid the award. *Id.* at 230. The author wishes to express his thanks to Russell M. Woods, attorney for Elmora Hebrew Center, for providing a copy of the submission agreement and the decision of the Bet Din.

40. See, e.g., SHULHAN ARUKH *Hoshen Mishpat* 12:5 (where facts are unclear); RESPONSA ROSH 107:6 (same); Gloss by Moses Isserles on SHULHAN ARUKH *Even Ha-ezer* 165:4 (where the law is unclear); ARIK, RESPONSA IMREI YOSHER 2:147 (20th century), quoted in S. SHILO, DINA DE-MALKHUTA DINA 410 (1974) (same); see also 11 ENCYCLOPAEDIA JUDAICA *Levirate Marriage and Halizah* 122, 128 (1972).

41. See TOSAFOT *Sanhedrin* 6b (comment beginning "Nigmar ha-din").

42. SHULHAN ARUKH *Hoshen Mishpat* 12:2.

43. *Id.* One might wonder why a winning side would agree to relinquish part of its award. Perhaps not all litigants are interested in winning only money; some are more interested in the satisfaction of having their claim vindicated in a neutral forum. Cf. Hoffer, *Honor and the Roots of American Litigiousness*, 33 AM. J. LEGAL HIST. 295 (1989) (Some people sue to vindicate their sense of honor.).

44. See RESPONSA RASHDAM TO SHULHAN ARUKH *Hoshen Mishpat* 116; SHAKH TO SHULHAN ARUKH *Hoshen Mishpat* 12 (comment 6); SHILTEI HA-GEBORIM, *Sanhedrin* 1b (commentary to code by Alfasi). All of these authorities are based on an earlier opinion by Isaiah ben Elijah di Trani (the Younger) (died circa 1280), who wrote that the judges could not impose the compromise but could try to persuade the parties to accept it. The opinion was rejected by other authorities. See PITHEI T'SHUVA COMMENT ON SHULHAN ARUKH *Hoshen Mishpat* 12.

ments, but it differed from that approach in that parties in American settlement negotiations typically reach an agreement based on their views of what is likely to happen if the case goes to trial. In reaching a settlement each party discounts the costs of trial. Although the American settlement buys peace, the quality of its justice is a reflection of the justice that would be meted out at trial. By contrast, the compromise in Jewish law was a method of trial by a court. The court would not base its compromise on the risks of litigation but would attempt to heal the underlying dispute between the parties and promote the welfare of the community.

In practice, then, Jewish law often accomplished many of the goals of a feminist jurisprudence. The parties were encouraged to work out their disputes by talking to each other and coming to an understanding of the other side's point of view.⁴⁵ When this was not possible, rabbis or others would attempt mediation. The mediator would try to have a heart-to-heart talk with each side and try to remove the anger from each side. When this failed, the judges or arbitrators would try to resolve the dispute so that each side would walk away happy. In this way, the relationships between the parties would stand a better chance of being healed than if the law were strictly applied.

2. *Cases of Strict Law Involving an Element of Compromise*

Jewish courts outside of Palestine during the Talmudic period lacked authority to award damages in many kinds of cases.⁴⁶ For example, personal injury cases were deemed to be uncommon and therefore not subject to an award of damages. The courts were not wholly without jurisdiction, however, over such cases. The courts could still render a verdict on the question of liability. If the verdict was in favor of the plaintiff, the court would place a ban on the defendant until he paid sufficient damages to satisfy either the plaintiff or the court.⁴⁷ In addition, the plaintiff could resort to self-help and seize the defendant's property subject to being ordered by the court to restore part of it to the defendant.⁴⁸ The practical effect of these cumbersome procedures was to enable the parties to negotiate. Having already resolved the question of liability, the parties could determine, subject to limited judicial supervision, the amount of damages that would be adequate.

In other important respects, Jewish law allowed for flexibility in shaping the law to fit the needs of the parties and the community. Jewish courts

45. Cf. Menkel-Meadow, *supra* note 8, at 51.

46. SHULHAN ARUKH *Hoshen Mishpat* 1:1-5, translated in E. DORFF & A. ROSETT, *supra* note 39, at 317-18.

47. A ban was a form of social ostracism that varied in scope over the centuries. See 8 ENCYCLOPAEDIA JUDAICA *Herem* 344, 350-55 (1972).

48. *Id.*

and communities had emergency powers to prevent the breakdown of order in the community. Jewish leaders acting under this potentially far-reaching power were to do so "for the sake of Heaven."⁴⁹ More generally, rabbis recognized that circumstances could often dictate the content of a rule of law. There might be one rule of law to be announced in a public discourse, a more lenient rule to be given in private to one who sought guidance, and an even more lenient standard in the face of an actual practice.⁵⁰ In addition, rabbis could tailor the rules of law to meet the needs of a particular case and the individuals appearing before them. For example, a wicked individual could be penalized by being made subject to a stricter rule, and less powerful individuals could be aided by the court imposing a more lenient rule.⁵¹ Thus, rabbis possessed significant discretion—even in cases that were decided according to "strict law"—to fashion a rule that would do justice in the individual case.

3. *Avoidance of Formal Claims*

A feminist jurisprudence based on Carol Gilligan's concept of the different voice would tend to avoid using rules to resolve problems. Instead, it would look more to the facts of each case. It would define problems not in terms of rights but in terms of relationships.⁵² While Jewish law pursued these goals by preferring compromise to adjudication according to strict law, Jewish law also tried to achieve these goals by its abhorrence of statutes of limitations and other formal pleadings that can mask the legitimacy of the underlying claim.

Jewish law generally operated without a statute of limitations.⁵³ Courts treated old claims as being more suspect, and a judge would look at them more closely.⁵⁴ But courts did not automatically bar claims if they were old.

49. SHULHAN ARUKH *Hoshen Mishpat* 2, translated in E. DORFF & A. ROSETT, *supra* note 39, at 319.

50. TALMUD *Taanit* 26b-27a; TALMUD *Nedarim* 23b; see also RASHI ON TALMUD *Berakhot* 33b (comment beginning "Halakhah").

51. See, e.g., TALMUD *Bava Kamma* 96b; see also A. KIRSCHENBAUM, *supra* note 36, at 86-98.

52. Cf. N. NODDINGS, *supra* note 5, at 24 ("To care is to act not by fixed rule but by affection and regard.").

53. See M. ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* 110 (1973) (Hebrew); 11 *ENCYCLOPAEDIA JUDAICA* *Limitation of Actions* 251 (1972). There were two exceptions, both relating to widows. A widow's claim for the amount of money stipulated in the prenuptial agreement—known as the *ketubah*—which becomes due upon divorce or upon the death of the husband, was considered waived if not brought within 25 years. Her claim for maintenance was considered waived if not brought within three years for rich widows and two years in the case of poor widows.

54. E.g., RESPONSA ROSH 68:20; see also RESPONSA RASHDAM *Hoshen Mishpat* 367 (If a court cannot find reason for delay in bringing suit by plaintiff's father before he died, it ought to make a compromise.).

By the seventeenth century, Jewish communities allowed defendants to plead the lapse of time, but this only constituted a defense if the defendant also denied the existence of the debt and took an oath to that effect.⁵⁵ Thus, in Jewish law a defendant could not defeat a meritorious claim merely by asserting that the plaintiff had not brought the claim by a certain arbitrary date. In this way, the law furthered its goal of ensuring that courts do real justice, not formal justice.⁵⁶

The same approach is evident in the way Jewish law handled the claims of adverse possession. In Jewish law, occupation of land in an open and notorious way for a number of years would not defeat the claim of one who had evidence of ownership unless the occupant claimed to have acquired the land by purchase, gift, or inheritance.⁵⁷ By contrast, most American jurisdictions recognize a right of adverse possession if a party without color of title merely claims to own the land and occupies it in an open and notorious manner for a number of years.⁵⁸

Jewish law's dislike of formal claims is also evident in the rule that a judge was not to instruct a litigant that the opponent's claim was defective because of the want of some formal requirement. For example, if a plaintiff presented only one witness to support her claim, not the two required by strict law, the court was not to instruct the defendant to object on those grounds. The hope was that the defendant would admit to the plaintiff's claim if that claim were valid. In that way, a true judgment would emerge.⁵⁹ Thus, even in cases decided according to strict law, judges possessed a great deal of discretion and power to see that the results in the cases corresponded to real justice, not formal justice.

4. *Qualifications for Judges*

One way of checking the power of a court is to require that each case be decided by a panel of at least two judges. Because men and women may tend to see legal issues differently, one feminist scholar has suggested having a panel consisting of one man and one woman.⁶⁰ Judges in the Jewish legal system wielded enormous power. Their role was even more crucial when no

55. 11 *ENCYCLOPAEDIA JUDAICA* *Limitation of Actions* 251, 253 (1972); M. ELON, *supra* note 53, at 111.

56. Another factor may be that statutes of limitations are inconsistent with a system that values compromise and negotiation, for there ought not to be an arbitrary limit on the parties' ability to negotiate an amicable settlement.

57. *TALMUD Bava Batra* 41a; *MISHNEH TORAH To'en* 14:12; *SHULHAN ARUKH Hoshen Mishpat* 146:9.

58. See 3 *THE AMERICAN LAW OF PROPERTY* § 15.4(c) (1952).

59. *MISHNEH TORAH Sanhedrin* 21:10. If the judge sees that the litigant is trying to state a valid claim but cannot express it correctly, the judge may help him a little but must be very careful not to play the part of lawyer. *Id.* at 21:11.

60. Menkel-Meadow, *supra* note 8, at 52 n.75.

attorneys were present.⁶¹ Jewish law guarded against the abuse of this power by requiring Jewish courts normally to consist of three judges.⁶² Verdicts in cases tried according to strict law needed to be decided by a majority vote; verdicts in compromise cases had to be unanimous.⁶³ In this way Jewish law effectively guarded against any one judge wielding too much control.

Within feminist jurisprudence there is discussion of an ideal judge as one who sees judging as an act of responsibility. The male ideal of a judge is one who is dispassionate, disinterested, disengaged, and independent. The female judge is the opposite: she is related, dependent, embedded, and interconnected.⁶⁴ How do the requirements of a judge under Jewish law measure up? The most obvious difference between Jewish law and a feminist jurisprudence is that Jewish law did not allow women to be judges.⁶⁵

61. See *infra* note 89 and accompanying text.

62. A single individual could preside if the parties agreed. SHULHAN ARUKH *Hoshen Mishpat* 3:2. Parties could choose to submit their cases to an ad hoc panel of arbitrators, and regular courts were presided over by rabbis appointed by the community.

Cases decided by compromise would not be valid unless there was a formal agreement witnessed by two persons, and normally the panel would witness the submission. Thus panels hearing arbitration cases usually consisted of at least two members, although there were some opinions that a panel of even one arbitrator could suffice. See SHULHAN ARUKH *Hoshen Mishpat* 12:7. Parties could request panels larger than three, for it was considered that the greater the number of judges the greater the truth that would emerge from the case. GLOSS BY MOSES ISSERLES TO SHULHAN ARUKH *Hoshen Mishpat* 13:1; see also SHULHAN ARUKH *Hoshen Mishpat* 3:4 (It is praiseworthy to have more than three judges.).

63. SHULHAN ARUKH *Hoshen Mishpat* 3:2.

64. Heilbrun & Resnik, *supra* note 8, at 1949-51. The American Bar Association criteria for evaluating candidates for judicial office mention "compassion" as one character of a judge. See AMERICAN BAR A., STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 4 (1988); JUDICIAL ADMIN. DIV., AMERICAN BAR A., GUIDELINES FOR REVIEWING QUALIFICATIONS OF CANDIDATES FOR STATE JUDICIAL OFFICE para. 4 (1988). The American Bar Association standards also require candidates for state judicial office to be humble. *Id.* Others who have written on the ABA standards have not referred to these elements. See Thomas, *The ABA and the Federal Judicial Section: A Proud Tradition Under Attack*, 72 A.B.A. J. 6 (Nov. 1986) (focus is on legal competence, integrity, and judicial temperament). Judge Kaufman of the Second Circuit said that a judge is "a paragon of virtue, an intellectual Titan, and an administrative wizard." He recognized that one would more likely have to settle for someone who had a sense of openness consistent with our tradition of giving each side a say. Castle, *How Should Supreme Court Justices Be Selected?*, 71 A.B.A. J. 132 (Mar. 1985).

65. SHULHAN ARUKH *Hoshen Mishpat* 7:4; JERUSALEM TALMUD *Yoma* 6:1. The Bible describes Deborah as one who "judged" and as one to whom the Israelites came for "judgment." *Judges* 4:4-5 (King James Version and Revised Standard Version). This apparently caused some rabbis to conclude that women were eligible to become judges. See COMMENTARY OF THE RITVA TO TALMUD *Kidushin* 35a (R. Yom Tov ben Abraham Ishbili, circa 1250-1330); SEFER HA-HINUKH 77 (anonymous work probably dating from the 13th century) (indicating the view of others). In some of the Tosafot, the possibility is mentioned that Deborah was a judge and that women are eligible to be judges. See TALMUD *Niddah* 50a (comment beginning "Kol Ha-kasher" (first answer)). But other comments by the Tosafot suggest that Deborah was special in that she possessed divine inspiration and so was accepted by them as judge or that she did not really act as a judge at all but only instructed others in the law. See TOSAFOT ON TALMUD *Bava Kamma* 15a (comment beginning "Asher"); TOSAFOT ON TALMUD *Shevuot*

However, Jewish law had certain criteria for a good judge that are consistent with feminist values. For example, the Talmud teaches that only fathers could become members of the Sanhedrin.⁶⁶ Further, a very old man could not be on the Sanhedrin, for, as Rashi explains, he would have "forgotten the pain of raising children and so would not be compassionate."⁶⁷ One who did not have children might turn out to be cruel.⁶⁸ Fathers who knew first hand the "pain of raising children" would be more likely to empathize with people.

Jewish law did not require lower court judges to be parents, but it did expect them to be compassionate. Jewish law listed the following seven qualifications for such judges: wisdom, humility, fear of God, hatred of unjust gain, love of truth, respected and upstanding reputation.⁶⁹ "Respect" did not refer to the respect that is given to someone because of his power or high position. Quite the opposite. As Maimonides explained, the source of respect for judges must be "their concern for the welfare of others, their humility, the pleasantness of their company, and their gentle speech and

29b (comment beginning "Shevuat Ha-edut"); TOSAFOT ON TALMUD *Gitin* 88b (comment beginning "Velo"); TALMUD *Yevamot* 45b (comment beginning "Mi lo tavla"). This approach was adopted by Jacob ben Asher in the Tur, who wrote that Deborah only instructed the judges. TUR *Hoshen Mishpat* 7:5.

Many modern Bible scholars observe, based on comparison to other Semitic languages, that the Hebrew word for "judge"—"shofet"—also meant ruler. E.g., L. KOEHLER & W. BAUMGARTNER, LEXICON IN VETERIS TESTAMENTI LIBROS 1003 (1958); F. BROWN, S.R. DRIVER & C. BRIGGS, A HEBREW AND ENGLISH LEXICON OF THE OLD TESTAMENT 1047 (1907); see also JEWISH PUBLICATION SOC'Y, TANAKH: A NEW TRANSLATION OF THE HOLY SCRIPTURES ACCORDING TO THE TRADITIONAL HEBREW TEXT 377 n.* (1985). The new translation by the Jewish Publication Society therefore translates Judges 4:4-5 to mean that Deborah "led" her people and that they came to her for "decisions." But other modern scholars conclude, either because of Judges 4:5 or because of her role as a prophet, that Deborah actually did act as a judge. E.g., Y. KAUFMANN, SEFER SHOFETIM 122 (1964); see 5 ENCYCLOPAEDIA JUDAICA *Deborah* 1429, 1430 (1972). The issue for our purposes, however, is what the rabbis in the premodern period understood the word to mean. There is some indication that at least some of these rabbis may also have understood the term to mean "leader." See COMMENTARY OF THE RITVA TO TALMUD *Kidushin* 35a, *supra*; COMMENTARY OF RABBENU NISSIM TO ALFASI'S CODE BEGINNING OF CHAPTER 4 OF SHEVUOT (circa 14th century) (alternative interpretation).

Whatever her role, be it judge, teacher, prophet, or chieftain, some within the Conservative movement of Judaism have used the example of Deborah as a basis for the ordination of women rabbis. See Gordis, *The Ordination of Women*, in THE ORDINATION OF WOMEN AS RABBIS: STUDIES AND RESPONSA 47, 65 (S. Greenberg ed. 1988); Roth, *On the Ordination of Women as Rabbis*, in *id.* at 127, 164-65.

66. The Sanhedrin was the supreme court and legislative body of the Jewish people during Roman times.

67. RASHI ON TALMUD *Sanhedrin* 36b (comment beginning "Zaken"). The rule is codified in MISHNEH TORAH *Sanhedrin* 2:3. Chapter 7 of the TOSEFTA, a collection of earlier teachings, said that a childless person could hear monetary cases but not capital cases.

68. MISHNEH TORAH *Sanhedrin* 2:3.

69. *Id.* at 2:7, as translated in J. ROTH, THE HALAKHIC PROCESS: A SYSTEMIC ANALYSIS 144-45 (1986). The list is based on the qualifications that Moses sought in appointing lower judges: men of valor, God-fearing men, men of truth, haters of unjust gain, *Exodus* 18:21, and wise and understanding men, known within your tribes, *Deuteronomy* 1:13.

dealings with their fellow men.”⁷⁰ Maimonides also explained that “one who hates unjust gain” means one who is not anxious about his own money and does not pursue the amassing of money.⁷¹ The law did not require that all judges possess all seven traits. But a community was to strive to appoint courts of three judges that collectively would have all seven.⁷² Jewish law, then, expected a judge or at least a panel of judges to be compassionate, humble, and concerned about fellow human beings.

The Jewish religion imposed an awesome responsibility on judges. According to Jewish thought, if a judge decided a case correctly, he would cause the Divine presence to dwell on the Jewish people, and he became, as it were, a “partner” with God in the creation of the world by restoring order. But if the judge erred, he caused the Divine presence to depart from the Jewish people and was liable in a heavenly court to pay with his life. He was to act “as if a sword were resting over his neck and that hell was open beneath his feet.”⁷³ Like the ideal judge in feminist jurisprudence, the Jewish judge was expected to see his task as one of responsibility to repair the breaches within the community.

Jewish law expected judges to be independent. Jewish law expected judges to scrupulously avoid any gift, honor, or courtesy that might even remotely suggest that the judge would be biased in favor of someone's cause.⁷⁴ But a fundamental requirement of judging was to be in touch with the practical needs of everyday life. A court was not to impose a requirement on people that would make life unbearably difficult.⁷⁵ Jewish law also expected a judge to be a spiritual leader and someone who filled the “total spectrum

70. *Id.* This is consistent with the statement in THE ETHICS OF THE FATHERS 4:1: “Who is worthy of honor? He who respects his fellow-men.” J. HERTZ, DAILY PRAYER BOOK 667 (1960).

71. MISHNEH TORAH *Sanhedrin* 2:7.

72. COMMENTARY OF RADBAZ TO MISHNEH TORAH *Sanhedrin* 2:7 (circa 1479-1573).

73. MISHNEH TORAH *Sanhedrin* 24:8-9. Perhaps more pointedly, the Talmud says he is to act as if the sword were placed between his flanks. MISHNEH TORAH *Sanhedrin* 7a.

74. The Talmud recounts that a litigant helped Samuel get out of a boat, thereby disqualifying Samuel from his case; another man removed a bird (or according to Maimonides, he removed a bird's feather) from Amemar's head and thereby disqualified Amemar; Mar Ukva disqualified himself when a certain man covered up some spit that was in front of him; R. Ishmael disqualified himself when one of his sharecroppers who used to bring him a basket of fruit every Friday once brought it on a Thursday instead. TALMUD *Ketubot* 105b; MISHNEH TORAH *Sanhedrin* 23:3. The Tosafot says that the above examples were situations where individual judges were more scrupulous than the law required.

75. This was the rule as to legislation. See MISHNEH TORAH *Mamrim* 2:5 (A new law should not be made unless most of the people will be able to tolerate it.). This was also a principle applied in deciding cases. For example, the Rashdam, Samuel ben Moses de Medina, one of the leading authorities of the 16th century, upheld the validity of all agreements, including marital agreements, made by Jews who were forced to convert to Christianity but who later escaped to countries where they were able to practice Judaism openly. In part his reason was that otherwise one would not be allowing these Jews to live, echoing the dictum in TALMUD *Bava Kamma* 91b. RESPONSA RASHDAM TO SHULHAN ARUKH *Hoshen Mishpat* 327; see also TOSAFOT ON TALMUD *Bava Metzia* 39b (comment beginning “Sheyatsa”).

of human relationships beginning with leadership and leading to love."⁷⁶

The picture of the ideal Jewish court that emerges from the classical sources was a panel of God-fearing men who loved and cared for people. They were humble. They were not self-centered people, nor did they become judges because they had amassed great wealth and fame. The act of judging was at its best the fulfillment of a religious responsibility for restoring and creating order in the world. This seems to be consistent with the feminist ideal of a judge who sees herself as interconnected with others and who feels that judging is a responsibility.⁷⁷

5. Reason and Intuition

Feminists assert that the male concept of justice is based on objective reasoning whereas the female concept relies more on experience, context, intuition, and subjective judgment.⁷⁸ The post-Talmudic Jewish law developed along lines that parallel the feminist viewpoint.

The Bible seemed to require that cases could be resolved in court only by the testimony of two witnesses.⁷⁹ On its face, this rule of evidence allowed no room for intuition or subjective judgment. But Jewish law gradually developed far from this formal rule. Beginning in the Talmudic period, judges had slightly more power to evaluate the weight of the testimony.⁸⁰ A judge in this period could shift the burden of taking an oath from the defendant to the plaintiff if the judge had good reason to believe that the defendant was untrustworthy.⁸¹ The Talmud also allowed judges to use their judgment in deciding whether property in the possession of a poor man at his death was his own or was merely on deposit. Judges were also empowered to use their judgment in deciding the intention of someone who had made a gift as to the identity of the donee and as to whether the gift was intended to be absolute or conditional.⁸² But if a judge believed that a plaintiff was fabricating a claim, the judge's only recourse was to recuse himself.⁸³ This would not preclude a subsequent action before a different judge.⁸⁴

76. See the remarks of Rabbi Soloveitchik in SHIUREI HARAV, *supra* note 36, at 83.

77. The call within feminist jurisprudence for judges who would appreciate the meaning of law within an interdisciplinary context, see Menkel-Meadow, *supra* note 8, at 59, is echoed to some extent by the requirement in Jewish law that judges possess an understanding of worldly matters that might come before them. MISHNEH TORAH *Sanhedrin* 2:1.

78. See e.g., Freedman, *supra* note 8, at 850; Karst, *supra* note 8, at 500; Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 602 (1986); Sherry, *supra* note 8.

79. Deuteronomy 19:15.

80. See Enker, *Self-Incrimination in Jewish Law (A Review-Essay)*, 4 DINÉ ISRAEL 107, 112-13 (1973).

81. TALMUD *Ketubot* 85a.

82. See TALMUD *Ketubot* 85b; TALMUD *Bava Batra* 146b.

83. TALMUD *Shevuot* 30b.

84. MISHNEH TORAH *Sanhedrin* 24:3.

In the post-Talmudic period, judges took a more active role in the trial process to guarantee justice. They were willing to rely more on intuition, experience, and subjective judgment. For example, one of the great authorities of the late thirteenth and early fourteenth century, Asher ben Jehiel, also known as the Rosh, ruled that if he believed that a plaintiff had fabricated a claim he would issue a writ that no judge is to handle the matter and give the writ to the defendant.⁸⁵ Moreover, the Rosh ruled that because judges have an overriding responsibility "to make peace in the world" they have discretion to decide a case based on what they believe to be the truth even if there is no reason or proof.⁸⁶ In making this far-reaching pronouncement, the Rosh relied in part on the famous story of King Solomon. In the story, King Solomon had to decide which of two prostitutes who came before him, each claiming to be the mother of a child, was the real mother.⁸⁷ According to the Rosh, Solomon judged, in his estimation and without formal proof, that one of the women had compassion for the child. He therefore gave her the living child. The Solomon story is a powerful one, open to many interpretations. Gilligan uses the story of the two women as an example of how a woman could be willing to sacrifice the truth to save a child in contrast to Abraham, who was willing to sacrifice his son for what he believed was the truth.⁸⁸ The Rosh, looking at the story from the viewpoint of a judge, saw Solomon's

85. RESPONSA ROSH 68:20.

86. RESPONSA ROSH 107:6. Asher ben Jehiel lived from 1250 until 1327. Educated in France and Germany, he moved to Spain in 1303 to escape persecution. In the responsum cited above, the Rosh wrote that judges can base their decision on the judges' own view of the matter where it cannot be clarified by proofs and testimonies, sometimes by judicial estimation and sometimes according to a compromise. In the particular case the defendant raised a defense which, when examined in the light of his answers to interrogatories, seemed to the judge to be improbable. Maimonides had similarly concluded that judges could decide monetary cases based on their own judgment of what was true. MISHNEH TORAH *Sanhedrin* 24:1; see also A. KIRSCHENBAUM, *supra* note 36, at 81-82; 3 *ENCYCLOPAEDIA JUDAICA Arbitration* 294 (1972).

In the responsum mentioned above, the Rosh significantly distinguished and practically overruled the Talmudic enactment that extensive cross-examination of witnesses could only take place in capital cases, not in civil cases. See *TALMUD Sanhedrin* 32a (bottom of page). He said that the Talmudic rule did not apply to cases where the defendant had resorted to trickery and false claims and that in such cases cross-examination was appropriate. RESPONSA ROSH 107:6.

87. 1 *Kings* 3:16-28. As recounted in the Book of Kings, two women who lived in the same house had given birth at about the same time to sons. One night, one of the children died. The women both claimed to be the mother of the living child. King Solomon ordered that the living child be cut in two so that each woman might take half. One of the women pleaded with Solomon to save the baby and let the other woman have him. The other woman insisted that the King's order be carried out. The King ordered that the child be given to the woman who had shown compassion and declared her to be the child's mother.

88. C. GILLIGAN, *supra* note 5, at 104-05. Another interpretation is that Solomon selected the better mother, not the biological mother. Colb, *Words That Deny, Devalue, and Punish: Judicial Responses to Fetus Envy*, 72 B.U.L. REV. (forthcoming).

ability to overcome the requirements of strict proof where his sense of justice dictated otherwise.

6. *The Reluctance to Use Attorneys in Jewish Law*

By limiting the use of attorneys, Jewish law enhanced the degree of discretion that courts and arbitrators had to resolve disputes. In the Talmudic period, a rabbi was generally precluded from giving legal advice to a person engaged in a dispute. One concern was that lawyers might teach one of the litigants how to lie.⁸⁹ But a rabbi was to be very cautious about advising a party who seemed to make a legitimate claim.⁹⁰ Such advice could harm another person and might prevent the parties from resolving their disputes according to their own sense of fairness. The Talmud made an exception to enable one to help one's own relative, because one owes a greater allegiance to a relative than to a stranger. But even this exception did not authorize a great rabbi to aid his relative. The Talmud records two instances where great rabbis aided their relations only to regret having done so.⁹¹ A great rabbi ought not to stoop so low.

Similarly, in the Talmudic period parties could not have lawyers appear with them in court. The only way in which attorneys could appear in court was if they received an assignment of the claim from the plaintiff.⁹² Defendants in the Talmudic period could not assign their defense to an attorney. Some Talmudic authorities looked askance at attorneys, applying to them the verse in Ezekiel that they are like him "who did that which is not good among his people."⁹³ The reason, explained Rashi, the great commentator of the eleventh century, was that an attorney might be less willing than a client to make a compromise with the other side.⁹⁴ A client

89. See RESPONSA RIVASH 235 (circa 1326-1408) (An attorney ought not to be appointed for a criminal defendant until after the court has had an opportunity to obtain his confession because the attorney might teach the defendant how to lie.). This also seems to be the point of the account of the Jerusalem Talmud that Rabbi Johanan gave advice to one of his female relatives because he knew that she was telling the truth. JERUSALEM TALMUD *Ketubot* 4:10; JERUSALEM TALMUD *Bava Batra* 9:4. The *Ethics of the Fathers*, a tractate of the Mishna, says that one ought not to act like the "orchei hadayanim." ETHICS OF THE FATHERS 1:8. One interpretation of this saying is that "orchai hadayanim" means lawyers. The Jerusalem Talmud asked how Rabbi Johanan could have acted consistent with that dictum. Apparently the same story is recounted in the Babylonian Talmud, but there Rabbi Johanan later regrets having given the advice. TALMUD *Ketubot* 52b; see also TALMUD *Ketubot* 86a.

90. See COMMENTARY OF MAIMONIDES TO ETHICS OF THE FATHERS 1:8.

91. TALMUD *Ketubot* 52b & 86.

92. For a discussion of some of the points raised in this section, see 3 ENCYCLOPAEDIA JUDAICA *Attorney* 837 (1972); Friedell, *Legal Ethics and the Jewish Tradition*, 52 RECONSTRUCTIONIST 20 (March-April 1987); Frimer, *The Role of the Lawyer in Jewish Law*, 1 J. OF LAW & RELIGION 297 (1983).

93. Ezekiel 18:18.

94. COMMENTARY ON TALMUD *Shevuot* 31a (comment beginning "Ze ha-ba be-harsha'a").

might know of some other claim that the defendant had against him, or the client might have some other moral reason for agreeing to a compromise that would preserve the relationship between the parties.⁹⁵

Some post-Talmudic authorities explained that the purpose of having the parties appear in court unaided by counsel was to make it less likely that the parties would lie. The assumption was that few people would have the audacity to lie while facing their opponent in front of a religious court.⁹⁶ A lawyer, who might not know the truth of the matter, would be less likely to tell the truth. Alternatively, lawyers might not appreciate the relationship between the parties and the significance of the dispute within that relationship. Lawyers, therefore, might be more inclined to press a case harder than their clients would. When lawyers are involved in the resolution of a dispute, the dispute is less likely to result in a solution that would heal the wounds between the parties.⁹⁷

An important exception to this rule was that an attorney was allowed to represent a plaintiff who was unable to successfully bring the claim either because the defendant was far away or because the plaintiff lacked the skill to fashion the pleadings adequately. In such circumstances, acting as an attorney was not only permitted, it was also considered to be the fulfillment of the "mitzvah" of relieving an oppressed person.⁹⁸

After the close of the Talmudic period, the pressures for allowing more general use of attorneys gradually overcame most of the earlier resistance. In the course of time, both plaintiffs and defendants regularly were allowed

95. See COMMENT OF THE MAHARSHAH TO TALMUD *Shevuot* 31a (Rabbi Samuel Edels, circa 1555-1631).

96. See MEIRAT EINAYIM TO SHULHAN ARUKH *Hoshen Mishpat* 124 (applying this factor to explain why a defendant could not appoint an attorney). There was a legal presumption that a defendant who was being sued for failure to pay a debt would not have the nerve to deny the debt when confronted in court by the creditor who had lent the money (without interest) in order to help the borrower. Joshua Falk, author of the commentary, explains that plaintiffs were permitted to assign their cases to an attorney because a plaintiff, not necessarily having a prior relationship with the defendant, would not be presumed to be telling the truth. The explanation offered does not explain why defendants in other types of situations, such as tort cases, would be denied an attorney, for in these other types of situations there would be no presumption that the defendant's denial would be truthful. It seems that one of the effects, if not one of the purposes, of denying an attorney to defendants and the reluctance with which the Talmud allowed plaintiffs to assign cases to attorneys was to maximize the chance that parties would tell the truth and settle their claims amicably.

97. In capital cases, Jewish law allowed defendants to have attorneys. The reason for the distinction was that all were under a religious obligation to save a human life, and the courts were compelled to listen to anyone who offered to speak in the defendant's behalf. But here, too, there was concern that lawyers would teach their clients to lie. See RESPONSA RIVASH 235.

98. "Mitzvah" means commandment. TOSAFOT *Shevuot* 31a (comment beginning "Ze haba be-harsha'ah") indicates that one who collects money owed to people who are unable to collect it themselves performs mitzvah. Joseph Caro, author of the SHULHAN ARUKH, explains that the mitzvah is to relieve oppressed persons of their burden. BEIT YOSEF TO TUR *Hoshen Mishpat* 123.

to assign their cases to attorneys.⁹⁹ This was especially true in Spain and Italy.¹⁰⁰ Several other communities as late as the nineteenth century still retained some limitations on the types of cases in which attorneys could participate. Sometimes communities restricted attorneys to representing widows, orphans, or relatives.¹⁰¹ In a few communities, rabbis actually encouraged parties to retain counsel in domestic relations cases. The theory was that in such cases the parties might be unable to overcome their animosity and that the lawyers might promote settlement.¹⁰² In Israel today, the usual practice in the Rabbinical courts is to allow lawyers to appear in court but to require the parties themselves to begin their own pleading.¹⁰³

The decline of the Talmudic ideal regarding the use of attorneys weakened the ability of Jewish courts and arbitrators to aid parties to resolve their disputes amicably. There is no guarantee that Jewish law, like any other dynamic body of law, will always improve. But some Jewish communities retained much of the Talmudic ideal, and courts retained other ways of securing compromise and compassion.

7. *A Controlled Market*

The discussion until now has focused on procedural aspects of Jewish law that fostered responsibility. The remainder of this part of the Article will show that the same goals were pursued by the substantive aspects of Jewish law.

A hallmark of feminism is that men tend to see the world as a forum where individuals engage in a contest of rights. By contrast, women tend to see people as members of a network of interdependent relationships.¹⁰⁴ As applied to the commercial world, the male view is compatible with a free market economy where competition is good, provided only that the competitors play according to the rules. A feminist viewpoint focuses more on fostering a caring relationship between buyers, sellers, and competitors.

The Jewish view resembled the feminist outlook. Jewish law sought to prevent sellers from charging more than a fair price and to prevent buyers

99. See, e.g., 3 RESPONSA RASHBA 141 (Facts show that an attorney was hired to regularly represent a certain client in both Jewish and non-Jewish courts.); see also TOSAFOT TO TALMUD *Kidushin* 3a (comment beginning "Ve-Isha") (Rabenu Tam, the leading Tosafist of the 12th century, would regularly give a power of attorney to a non-Jew even though non-Jews could not act as ordinary agents under Jewish law.).

100. S. ASAF, BATEI HADIN VESIDREIHEM AHAREI HATIMAT HA-TALMUD 96 (1925).

101. *Id.* at 98. In some Jewish communities in Turkey, a party could appoint an attorney only if the other side did so. N. RAKOVER, THE JEWISH LAW OF AGENCY IN LEGAL PROCEEDINGS 342-43 (1972) (Hebrew). In modern Israel, the failure of a court to allow a party to have an attorney is not necessarily a grounds for appeal. See Frimer, *supra* note 92, at 302 (discussing a case where a husband in a support case was not allowed to have an attorney).

102. N. RAKOVER, *supra* note 101, at 343.

103. See *id.* at 347.

104. C. GILLIGAN, *supra* note 5, at 27-29.

from paying less than a fair price. The Talmud gave parties who were mistaken as to the fair price the ability to rescind a transaction or to reform it when the price worked out between the parties diverged by more than a sixth from the fair price.¹⁰⁵ Furthermore, even when both sides to a transaction were not mistaken as to the fair price, Jewish law forbade a seller from making a profit of more than one sixth in essential commodities.¹⁰⁶ In addition, Jewish courts and communities were authorized to fix prices and wages for these commodities.¹⁰⁷ A person who violated these standards violated the Biblical command "that thy brother may live with thee."¹⁰⁸ Similarly, Jewish law prohibited an individual from hoarding goods bought in the market, because hoarding would drive up the price. In times of famine, people who grew produce were not permitted to retain it for more than a year.¹⁰⁹ Not only did Jewish law require a seller not to deceive a buyer about defects in the goods purchased, but the seller was prohibited from deceiving a buyer by making it appear that the buyer was being given special consideration.¹¹⁰

In these ways, Jewish law curbed the desire to pursue self-interest and promoted assistance to the community. It is similar to a feminist approach in that Jewish law created an atmosphere where commercial transactions were not simply an opportunity for each side "to make a killing." One could not take advantage of another's ignorance or inability to bargain. The selling of necessary products was an activity that involved responsibilities for the community's welfare. Jewish law prevented sellers and buyers from treating each other as objects in order to advance their own interests. The law would lead sellers and buyers to treat each other as related individuals and to be concerned for each other's well-being.

The Jewish law regulating competition reflected the tensions caused by sellers' needs to make a livelihood, buyers' needs for lower prices, and the community's need for stable commercial relationships. According to the majority view in the Talmud, merchants could lower prices below the market price in the absence of a price fixed by the community.¹¹¹ Similarly, the majority of the rabbis allowed a seller to provide "free" presents of nuts or almonds to entice children to do business with them. The majority reasoned that competitors could meet the lower prices and the benefits of lower prices outweighed the risk of harm to other sellers. The concern of

105. TALMUD *Bava Metzia* 50b. For discrepancies of more than a sixth, the transaction was voidable; for discrepancies of exactly a sixth, the amount of the overcharge was returnable. See also 14 ENCYCLOPAEDIA JUDAICA *She'arim* 676 (1972).

106. See 7 ENCYCLOPAEDIA JUDAICA *Hafka'at She'arim* 1061 (1972).

107. SHULHAN ARUKH *Hoshen Mishpat* 231:27.

108. *Leviticus* 25:36; see 7 ENCYCLOPAEDIA JUDAICA *Hafka'at She'arim* 1062.

109. SHULHAN ARUKH *Hoshen Mishpat* 231:24.

110. SHULHAN ARUKH *Hoshen Mishpat* 228:6.

111. TALMUD *Bava Metzia* 60a.

the dissenting view was that these practices would cause buyers to become regular customers of the particular seller and deprive the other sellers of their livelihood.¹¹² In the post-Talmudic period some authorities allowed only sellers of grains and produce to lower prices. They prohibited all other merchants from doing so as it would harm their competitors.¹¹³ The approach of Jewish law was similar to a feminist outlook in that it permitted individuals to lower prices only after considering the needs of the community and balancing these needs against the potential harm to the other sellers.

The interest in protecting a merchant's livelihood took on greater importance when the issue became the right of a merchant to exclude new merchants from entering the market. Again the Talmud records differing opinions, but the majority view allowed some restrictions on the entry of a new competitor who was an "outsider."¹¹⁴ Although new competition might lower prices, it would also interfere with existing relationships and might harm the livelihood of the existing merchant. The complex set of rules that developed sought to balance these conflicting interests.¹¹⁵ When the new competitor was from the same town, the interests in allowing new competition were stronger, because doing so would benefit the community and a member of it. But when the new competitor was from a different town or country, the interest in maintaining a stable set of relationships took on greater importance. In some Jewish communities, a craftsman was entitled to a monopoly over his non-Jewish customers.¹¹⁶ In this instance

112. *Id.*; see also RASHI ON TALMUD *Bava Metzia* 60a (comment beginning "Ve-lo yifhot et ha-sha'ar").

113. N. RAKOVER, *COMMERCE IN JEWISH LAW* 34 (1987) (Hebrew); J. EPSTEIN, *ARUKH HA-SHULHAN*, ORAH HAYIM 228:14 (1893). The sale of grains and produce was distinguished because it was thought that wholesalers could meet lower prices. Some authorities allowed merchants to lower prices of all goods provided that they did not sell below a competitor's cost or otherwise engage in unfair competition. N. RAKOVER, *supra* at n. 126. In Talmudic times a substantial drop in prices was seen as a crisis requiring the community to offer special prayers even on the Sabbath. TALMUD *Bava Batra* 91a.

114. See TALMUD *Bava Batra* 21b.

115. In the *Shulhan Arukh*, Joseph Caro states that a merchant could not exclude a competitor from entering business in the same alleyway or courtyard even if the competitor lived in another part of town. But if the competitor were from another country, he could be excluded unless he paid the king's tribute. *SHULHAN ARUKH Hoshen Mishpat* 156:5. The gloss on this section by Moses Isserles, however, gives greater power to the first resident and to his fellow residents to exclude new competition. When the new competitor is from the same town, Isserles says that many authorities allow the residents of the alleyway or courtyard, but not the individual merchant, to exclude the competitor. When the new competitor is from another town, the first merchant can exclude him from entering business in the same alleyway or courtyard but cannot exclude him from entering business in another part of town. The citizens of the town can, however, exclude him from entering business anywhere in the town. Isserles further records that others allow the first merchant to exclude a new competitor from another town until the latter acquires a house and pays taxes not only to the king but to the ruler of the town. GLOSS OF MOSES ISSERLES TO *SHULHAN ARUKH Hoshen Mishpat* 156:5.

116. GLOSS OF MOSES ISSERLES TO *SHULHAN ARUKH Hoshen Mishpat* 156:5; see 11 *ENCYCLOPAEDIA JUDAICA Ma'arufya* 640, 641 (1972).

the interest of the Jewish craftsman was strong compared to a weak interest of the Jewish community as a whole. Jewish law recognized the right to unrestrained competition in one area—the teaching of Torah.¹¹⁷ The value of this basic service to the community simply outweighed any other consideration.

The approach of Jewish law to prevent new competition was similar to a feminist outlook. Jewish law considered the value to the community of lower prices that might result in allowing new competitors to enter the market. But it balanced this need against the desire to protect existing relationships and the desire to protect the livelihood of existing sellers. Jewish law was sensitive to the concern that new competition could cause real harm to people within the community.

As for loans, Jewish law forbade the payment of interest if both parties were Jewish.¹¹⁸ Although parties often found ways to circumvent these restrictions,¹¹⁹ the ideal promoted by Jewish law was a cooperative commercial world. Parties were to help others, even competitors, to remain in business. It was in fact a “mitzvah,” a commandment, to make interest-free loans to poor people to enable them to have a livelihood.¹²⁰ Again, the outlook of Jewish law in this regard was similar to a feminist outlook. The commandment to make interest-free loans and the prohibition on charging interest reinforced an approach that emphasized cooperation instead of competition. They fostered an attitude of responsibility and concern for the welfare of other individuals instead of an attitude of relating to others as objects who might be useful in pursuing one’s own advantage.

The object of Jewish life was not to become rich.¹²¹ Although the weekday prayers included a plea for economic sustenance,¹²² ideally material wealth would enable its owner or others to engage in the study of Torah.¹²³ Work

117. TALMUD *Bava Batra* 21b; SHULHAN ARUKH *Hoshen Mishpat* 156:3.

118. See TALMUD *Bava Metzia* 60b *et seq.*; MISHNEH TORAH *Malveh Ve-Loveh* 4-10; SHULHAN ARUKH *Yoreh Deah* 160-77.

119. See H. Soloveitchik, *Pawnbroking: A Study of Ribbit and of the Halakhah in Exile*, in 38-39 PROCEEDINGS OF THE AMERICAN ACADEMY FOR JEWISH RESEARCH 203 (1970-71); 16 ENCYCLOPAEDIA JUDAICA *Usury* 27, 31 (1972).

120. MISHNEH TORAH *Malveh Ve-Loveh* 1:1.

121. THE ETHICS OF THE FATHERS 4:1 teaches: “Who is rich? He who rejoices in his portion.” J. HERTZ, *supra* note 70, at 667; cf. J. NEUSNER, *THE ECONOMICS OF THE MISHNAH* 72 (1990) (The Mishnah tried to create and maintain a market where no party gained or lost in any transaction.).

122. See J. HERTZ, *supra* note 70, at 141-43 (“Bless this year unto us, O Lord our God, together with every kind of produce thereof for our welfare; give a blessing upon the face of the earth. O satisfy us with thy goodness, and bless our year like other good years. Blessed art thou, O Lord, who blessest the years.”).

123. According to Rabbi Johanan, a leading Palestinian authority (circa 180-279), all of the good prophesied by the prophets described only the reward given to one who marries off his daughter to a scholar, to one who conducts business on behalf of a scholar, and to one who

was therefore valued¹²⁴ but as a means to an end. This ideal was incompatible with inflicting hurt on others through an unrestrained market. Rather, it was a "mitzvah," a commandment, to enable one's fellow to live also. The Jewish community's needs took precedence over an individual's desire to amass great wealth.

8. *The Primacy of Duties*

A leading feature of the type of feminist jurisprudence being discussed here is that it emphasizes responsibility over rights. This priority is consistent with the Jewish law view.¹²⁵

Jewish law began with the assumption that its laws emanated from a command by God.¹²⁶ A Jew's basic approach to law is that the law is something that must be observed in order to keep the Jewish community's bargain with God. Of course, the existence of a duty binding on one person tends to lead to the recognition of an enforceable right in another party. But this is not always so. Within Judaism, there is a whole range of religious observances, prayers, and blessings that a Jew is obliged to perform, and

otherwise benefits a scholar. The reward of a scholar is even greater. TALMUD *Berakhot* 34b.

The Talmud contains a debate between two Palestinian rabbis who lived before the completion of the Mishnah, over whether one ought to work and study or only study. Rabbi Ishmael said that one ought to study and work. As Rashi explained, if one were to be in great need, one would be unable to study Torah. But Simeon ben Yohai said that when Jews fulfill God's will their work is done by others, and when they do not fulfill God's will they must work for themselves and for others. A later Babylonian scholar, Abaye, said that many followed Rabbi Ishmael's advice and succeeded whereas others followed Rabbi Simeon's advice without succeeding. Abaye's contemporary, Rava, proposed something of a compromise, advising his students not to appear before him during the two months necessary for harvesting grain and pressing olives and grapes so that they would not be troubled about their food supply for the remainder of the year. TALMUD *Berakhot* 35b.

The Talmud mentions that the following prayer was said when leaving the house of study: "I give thanks to you, Lord my God, that you have set my portion with those who sit in the house of study and you have not set my portion with those who sit in the street corners, for I rise early and they rise early, but I rise early for words of Torah and they rise early for frivolous talk; I labor and they labor, but I labor and receive a reward and they labor and do not receive a reward; I run and they run, but I run to the life of the future world and they run to the pit of destruction." TALMUD *Berakhot* 28b. A version of this prayer is said when a group finishes the study of any of the Talmud's tractates.

124. See, e.g., TALMUD *Berakhot* 8a ("R. Hiyya bar Ammi further said in the name of Ulla: A man who lives from the labor of his hands is greater than the one who fears heaven.").

125. See Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J. LAW & RELIGION 65 (1988); Silberg, *Law and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 306, 312-13 (1961); Weinrib, *Rescue and Restitution*, 1 S'VARA 59 (1990).

126. See, e.g., TALMUD *Berakhot* 5a:

R. Levi b. Hama says further in the name of R. Simeon b. Lakish:

What is the meaning of the verse: "And I will give thee the tables of stone and the law and the commandment, which I have written that thou mayest teach them" (Ex. 24:12)? "Tables of stone": these are the ten commandments; "the law": this is the Pentateuch; "the commandment": this is the Mishnah; "which I have written": these are the Prophets and the Hagiographa; "that thou mayest teach them": this is the Gemara. It teaches that all these things were given to Moses on Sinai.

this obligation does not confer rights on anyone. A Jew is also under various religious obligations to take certain precautions that do not create a right on anyone's part to sue for damages.¹²⁷ In some situations, there are duties in Jewish law that cannot be enforced in an earthly court but that are enforceable in a heavenly court.¹²⁸ Holmes's "bad man" might conclude that such a law does not bind him to do anything since it can not be enforced by a visible court.¹²⁹ But to the Jewish mind such a person would be "bad" in a different sense. Jewish law is premised upon the acceptance of its belief structure. Within that structure, the belief in divine justice is taken very seriously indeed.

9. *The Duty to Rescue*

One feminist scholar has suggested that a feminist jurisprudence would take the duty to rescue more seriously than does American law.¹³⁰ Under American law, there is generally no duty to rescue a stranger. Liability can be imposed, however, if a would-be rescuer begins to aid one in distress.¹³¹ If the two rules have any effect on behavior, it would be to discourage one from becoming involved.

By contrast, Jewish law imposed a duty to rescue a stranger or a stranger's property.¹³² Consistent with the limited range of tort liability available in Jewish law,¹³³ there was no tort liability for failure to rescue. But it was

127. For example, there is a duty to rescue one who is drowning or one who is being chased even though the violation of these duties subjects one to no punishment. See MISHNEH TORAH *Rozeah u-sh'mirat nefesh* 1:15-16. See also *infra* note 132 and accompanying text. Also, even though it is a positive command to erect a railing around one's roof and around one's wells in order to protect human life, MISHNEH TORAH *Rozeah u-sh'mirat nefesh* 11:1-4, liability in such cases is limited to claims for personal injury and does not include claims for wrongful death. MISHNEH TORAH *Nizkei Mammon* 13:1; SHULHAN ARUKH *Hoshen Mishpat* 410:20. One is also under an obligation to accompany a guest a certain distance when he takes leave, to visit the sick, to comfort the bereaved, and to provide for the needy bride. See, e.g., COMMENT OF JOSHUA FALK, MEIRAT EINAYIM, TO SHULHAN ARUKH *Hoshen Mishpat* 427 n.11. But there is no indication in Jewish law that one is liable for damages for any injuries that might occur from one's violation of these obligations.

128. SHULHAN ARUKH *Hoshen Mishpat* 418:7 (One who gives a lighted coal to a legally incompetent person is liable for resulting damage only in the court of heaven.); SHULHAN ARUKH *Hoshen Mishpat* 396:3 (If one knocks down an unsteady fence in the face of an animal and the animal goes out and causes damage, one is only liable in the court of heaven.); SHULHAN ARUKH *Hoshen Mishpat* 395:1 (Inciting another's dog to bite only imposes liability in the court of heaven.); SHULHAN ARUKH *Hoshen Mishpat* 32:2 (Hiring witnesses to testify for someone else only makes the hirer liable in the heavenly court.); see also TALMUD *Bava Kamma* 55b-56a.

129. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

130. Bender, *supra* note 8, at 37.

131. See, e.g., PROSSER & KEETON, THE LAW OF TORTS § 56 (5th ed. 1984).

132. SHULHAN ARUKH *Hoshen Mishpat* 426 (rescue of persons); SHULHAN ARUKH *Hoshen Mishpat* 259-71 (return and rescue of lost property).

133. See *infra* note 136 and accompanying text.

considered a grave religious fault not to rescue—one is commanded not to stand by the blood of one's neighbor.¹³⁴

10. *Obligations in Tort Cases*

American tort law focuses primarily on deciding when a defendant is liable. If liability is imposed, it is almost always in the form of money damages. The law thus allows all forms of injury to be reduced to a monetary "equivalent" and usually provides that the only obligation of the tortfeasor is to pay money. It has been suggested that a feminist jurisprudence would focus more on a tortfeasor's obligations to care for the person injured.¹³⁵ Where does Jewish law stand on these issues?

Jewish law imposed tort liability in a very narrow range of cases.¹³⁶ Liability for damages was very limited when compared with American law and when compared with the sweeping language of the Bible. For example, the case of one who digs a pit in a public way (a paradigm for any obstacle created in a public place) was addressed under the broad language of the Biblical rule:

And if a man shall open a pit, or if a man shall dig a pit and not cover it, and an ox or an ass shall fall therein, the owner of the pit shall make it good and give money unto the owner of them and the dead beast shall be his.¹³⁷

The Talmud limited this liability in several ways. According to the Talmud, the rule only applied to injuries to animals, not to the death of a person or the destruction of inanimate objects. And even in the case of an animal, it only applied to an animal that was unable to see where it was going, either because it was blind or because the injury occurred at night.¹³⁸

The Talmud limited tort liability in other ways. For example, there was an early principle that defendants were strictly liable for injuries caused

134. MISHNEH TORAH *Rozeah u-sh'mirat Nefesh* 1:14-16; SHULHAN ARUKH *Hoshen Mishpat* 426. The commandment is based on *Leviticus* 19:16.

The Talmud and post-Talmudic authorities dealt with a range of auxiliary problems such as the liability for damages caused to others by the person in danger, by the rescuer, and by the one placing the person in danger. The generally accepted view was that the rescuer of human life was entitled to compensation for rescue and that the one rescued was liable to pay for damages to property caused by his rescue. Rosh, *Sanhedrin* ch. 8; TUR *Hoshen Mishpat* 426; see Weinrib, *Rescue and Restitution*, 1 S'VARA 59 (1990). A leading authority of the 16th century, Samuel ben Moses De Medina, questioned whether the rescuer ought to be entitled to reimbursement, since the rescuer acts in his own interest to fulfill the obligation that God imposed on him. RESPONSA RASHDAM *Yoreh Deah* 204. In the case before him, Medina limited the right to reimbursement to successful rescues.

135. See Bender, *supra* note 8, at 37.

136. See Friedell, *Some Observations on the Talmudic Law of Torts*, 15 RUTGERS L.J. 897 (1984), reprinted in 13-14 DINÉ ISRAEL 65 (1988).

137. *Exodus* 21:33-34.

138. TALMUD *Bava Kamma* 54b.

directly by the defendant's body.¹³⁹ But later sources limited this principle rather severely by insisting that the plaintiff must be free of fault.¹⁴⁰ More generally, Jewish law apparently allowed a plaintiff to recover damages in other types of tort cases (such as where damage was caused by fire, animals, or obstacles) only when the plaintiff was less at fault than the defendant.¹⁴¹ In the case of injuries caused in an unusual manner by one's animal, the defendant was liable for only half of the damages.¹⁴² In addition to these restrictions, Jewish law did not recognize the concept of respondeat superior.¹⁴³

Jewish law severely limited liability to injuries caused very directly by the defendant.¹⁴⁴ The plaintiff might be able to enjoin the defendant from engaging in behavior that indirectly caused injury,¹⁴⁵ but damages were not obtainable. Nor was there a concept of joint and several liability in Jewish law.¹⁴⁶

139. See TALMUD *Bava Kamma* 26a-26b.

140. See COMMENT OF NACHMANIDES TO TALMUD *Bava Metzia* 82b. He takes issue with the Tosafot, who sought to explain the variety of rules in the Talmud by suggesting that the law recognized two categories of compulsion. According to the Tosafot, one type of compulsion is close to negligence and one acting under such compulsion would be liable for causing injury. The Tosafot maintained that for pure compulsion one is not liable. *TOSAFOT Bava Kamma* 27b (comment beginning "U-Shmuel"). Nachmanides suggests in effect that the Tosafot applied the two categories of compulsion simply to restate the conclusions reached in the Talmud and that the Tosafot's analysis does not really explain anything. He suggests instead that plaintiffs lose tort claims where they are at fault and the defendant is innocent. See generally Haut, *Some Aspects of Absolute Liability Under Jewish Law and Particularly Under the View of Maimonides*, 15 DINE ISRAEL 7, 29-31 (1989-90).

141. See Friedell, *Liability Problems in Nezikin: A Reply to Professor Albeck*, 15 DINE ISRAEL 97 (1989-90). In addition to the source cited there, see S. LURIA (circa 1510-1574), *YAM SHE'EL SHELOMO Bava Kamma* 2:29.

142. SHULHAN ARUKH *Hoshen Mishpat* 389:2.

143. See Hafetz, *Vicarious Liability in Jewish Law*, 6 DINE ISRAEL 49 (1975) (Hebrew); cf. *RESPONSA RASHBA WHICH HAD BEEN ATTRIBUTED TO NACHMANIDES* 20. The question raised was whether a principal or a partner could be liable for injuries to an agent or partner who was injured while engaged in business for the defendant or for the partnership. The answer was that there was no liability. Tort liability had to be based on either injuries caused by the defendant himself or for those caused by his negligence in not caring for his property. But in this case there was no damage caused by the defendant or his negligent care of property. Nachmanides continues: "If one hired a worker to be a smith, and a spark went out from under the hammer and burned a stalk belonging to the smith. Would the owner be liable? [No.] For it was [the employee's] work. And [this is so] even if the worker had [worked] gratuitously. And even if you say that the injury was caused by the agency, it is a case of indirect damage and he is exempt." There were very limited circumstances in Jewish law where a principal could be liable for the injuries inflicted by an agent. The most significant for our purposes was that bailees were liable for breaches of bailment committed by their agents. See Kirschenbaum, *The Rabbinic Law of Agency for Illegal Acts*, 4 DINE ISRAEL 55 (1973) (Hebrew).

144. For example it was considered indirect damage if one gave a flickering coal to a minor who allowed the coal to cause fire damage. TALMUD *Bava Kamma* 59b. Nor was one liable in an earthly court for placing poisonous food in front of an animal, even if the food was of the type that the animal might be expected to eat. TALMUD *Bava Kamma* 47b. In both cases the damage was deemed to be only indirectly caused by the defendant.

145. See TALMUD *Bava Batra* 22b-23a.

146. See Friedell, *supra* note 136, at 905.

The limited liability of Jewish tort law fit in well with other legal and social institutions. The Jewish law rules of tort developed before liability insurance. Since plaintiffs were probably as capable of bearing a loss as defendants, the system of limited liability seemed less harsh than it might in a modern context. The law considered people to be responsible for their own safety. The rule limiting liability to cases where the defendant was more at fault reflected this concern. Also, when the law made a defendant liable for half of the damages, it effected a type of loss sharing between the parties. Beyond that, the system of tort law was administered within a framework of compromise, and one can presume that in many cases the courts allowed some payment to an injured plaintiff. Furthermore, Jewish law gave individuals power to enjoin defendants from engaging in dangerous activity. Finally, Jewish law recognized that certain kinds of injuries were subject to divine justice but not to redress in an earthly court. In sum, Jewish law was more interested in preventing harm than in shifting the losses of unintentional injuries that had already occurred. This focus is consistent with the goals of a feminist jurisprudence.

The effects of limited liability in Jewish tort law were also moderated by the extensive network of charitable funds available within the Jewish community. The giving of charity was a "mitzvah," a commandment. The Hebrew word for charity is "zedakah," which means justice, and the giving of charity was an obligation that could be enforced in court.¹⁴⁷ The mitzvah was not merely to provide a meager existence for the poor, but to compensate a member of the community for his losses.¹⁴⁸ All within the community, even the poor, were required to give charity.¹⁴⁹ Charitable organizations provided the poor with a range of services including gifts of money, interest-free loans, food, clothing, medical care, visits to the sick, education, provisions for dowerless brides, ritual articles, and free burial.¹⁵⁰ Charity was to be given also to non-Jews in order to foster peace.¹⁵¹ When seen in this context, the limited liability of Jewish tort law was only one way in which the community provided for the needs of its members.

Jewish law did not go as far as some feminist scholars might advocate in terms of making tortfeasors assume responsibility for caring for the

147. MISHNEH TORAH *Mattenot Aniyyim* 7:3.

148. The Talmud relates that an old man once came before Rava in need of charity. He told Rava that he usually had fat chicken and old wine for his meal. When Rava objected that this might burden the community, the man pointed out that all property belongs to God. At that point Rava's sister happened to appear with a present for Rava of a fat chicken and some old wine. Rava apologized and invited the man to eat with him. TALMUD *Ketubot* 67b.

149. Charity consisting of a tenth of one's assets was considered an average gift; to give as much as a fifth was considered praiseworthy; to give less than a tenth was miserly. MISHNEH TORAH *Mattenot Aniyyim* 7:5.

150. See 5 ENCYCLOPAEDIA JUDAICA *Charity* 338, 345-48 (1972).

151. MISHNEH TORAH *Mattenot Aniyyim* 7:7.

people they injure. But Jewish law did seek to limit dangerous activities and to foster a community that cared for its members.

11. *The Importance of the Community*

In addition to the obligation to provide charity, there were numerous other ways in which Jewish law fostered a commitment to the community and its members. Jewish teachings warned a Jew not to separate from the community.¹⁵² Even greater than charity was the concept of "gemilut hasadim," performing acts of loving kindness.¹⁵³ It is said to be one of the pillars on which the world stands.¹⁵⁴ The commandment to perform such acts applied not only to gifts of money, but also to personal service. One was obligated to help not only the poor. Acts of loving kindness were due the wealthy and even the dead.¹⁵⁵

Judaism taught that every Jew had some responsibility for the conduct of every other Jew. There was a duty to try to prevent others from violating a commandment.¹⁵⁶ Jewish religious practices and beliefs fostered this attitude of mutual responsibility. Jews recited most prayers in the plural because they believed that God would answer a personal petition only if it included the needs of others.¹⁵⁷ For a similar reason, the confessions that a Jew makes on Yom Kippur are recited in the plural; one confesses not only for one's own sins but for those of the community.¹⁵⁸ Similarly, in a commonly used hyperbolic style, the Talmud taught that a Jew's prayers were only heard when said in a synagogue.¹⁵⁹ Not only was the place of prayer important, but the act of praying as a group was significant.¹⁶⁰ The Talmud taught that one who finished his prayers and left the synagogue while another was praying alone had prayed in vain.¹⁶¹

152. ETHICS OF THE FATHERS 2:5.

153. TALMUD *Sukkah* 49b; see 7 ENCYCLOPAEDIA JUDAICA *Gemilut Hasadim* 374 (1972).

154. ETHICS OF THE FATHERS 1:2. The other pillars are Torah and worship. *Id.*

155. TALMUD *Sukkah* 49b; see 7 ENCYCLOPAEDIA JUDAICA *Gemilut Hasadim* 374 (1972). One bestows acts of loving kindness on the dead by providing for and attending their funeral.

156. TALMUD *Shevuot* 37a-b; see also TALMUD *Sanhedrin* 27b. The expression used is that all Jews are sureties for one another.

157. TALMUD *Berakhot* 29b-30a.

158. See P. BIRNBAUM, HIGH HOLYDAY PRAYER BOOK 510 (1951).

159. TALMUD *Berakhot* 6a.

160. As Judith Plaskow has observed, "While many feminists may no longer be able to participate comfortably in such community, traditional Jewish worship certainly can create community among the participants. In addition, the accepted lack of decorum in many traditional synagogues testifies to the important relational function worship serves." J. PLASKOW, *supra* note 29, at 68.

Rashi suggests that there are three steps necessary for the formation of a community that can pray as one. There must be pleasant speech followed by the seeking of advice followed by an invitation. Rashi's Commentary on TALMUD *Berakhot* 42b (comment beginning "Bedun plan").

161. TALMUD *Berakhot* 5b. The Talmud says that his prayers are torn up in his face.

The Jewish mystical tradition further reinforced the connection that the individual was expected to feel toward the community. Within the Jewish mystical tradition, observance of a commandment not only affected the status of the individual, but also had a redemptive effect on the world and even on God.¹⁶² The ultimate aim of the Jewish mystic, to obtain an intimate attachment to God, could be achieved through observance of those commandments that are applicable to everyday living.¹⁶³ Jewish mysticism thus strengthened the law's aim of making people feel responsible for one another.

12. *The Pursuit of Peace*

The rabbis in the Talmud emphasized the importance of peace.¹⁶⁴ The rabbinic sources taught that: the purpose of the study of Torah was to increase peace in the world;¹⁶⁵ peace was one of the divine gifts to the world;¹⁶⁶ peace was one of the things that sustains the world;¹⁶⁷ the name of the Messiah was peace;¹⁶⁸ the name of God may be blotted out if necessary to restore peace between man and wife;¹⁶⁹ indeed, one of the names of God was peace;¹⁷⁰ and one who loved peace and pursued it was to inherit this world and the world to come.¹⁷¹ The rabbis minimized the militaristic elements in Jewish history, attributing these victories to God, not to the ability of Jewish armies.¹⁷²

162. See G. SCHOLEM, *MAJOR TRENDS IN JEWISH MYSTICISM* 233 (1941).

163. *Id.* at 233-34.

164. See Glatzer, *The Concept of Peace in Classical Judaism*, in *DER FRIEDE: IDEE UND VERWIRKLICHUNG (THE SEARCH FOR PEACE)* 27 (E. Fromm & H. Herzfeld, eds. 1961).

165. *TALMUD Berakhot* 64a; see also *TALMUD Kidushin* 30b (Those who study Torah together will start to hate each other but inevitably will love each other; the study of Torah protects one from the attractions of the evil impulse.).

166. *Leviticus Rabbah* 35:7.

167. *ETHICS OF THE FATHERS* 1:18.

168. *PEREK HA-SHALOM* para. 11 (printed as an addendum to *Derekh Eretz Zuta*, one of the minor tractates of the *TALMUD*).

169. *PEREK HA-SHALOM* para. 9. The reference is to the blotting out of God's name in the ritual described in *Numbers* 5:11-31, which concerns a wife accused of unfaithfulness.

170. *Id.* para. 11.

171. *Id.* para. 19.

172. For example, the Hanukkah celebrations focus on the miracle of the menorah that burned for eight days even though there was only enough oil for one day. The prayers on Hanukkah stress that the victory over the Syrians was due to God's mercy in delivering "the strong into the hands of the weak, the many into the hands of the few, the impure into the hands of the pure, the wicked into the hands of the righteous, and the arrogant into the hands of them that occupied themselves with thy Torah." J. HERTZ, *supra* note 70, at 153. In addition, on the Sabbath during Hanukkah the rabbis instituted as the reading of the Haftorah (a section of the prophets read after the reading of the Torah) a portion of Zechariah which includes a vision of menorah which the prophet is told means "Not by might, nor by power, but by my spirit, saith the Lord of hosts." *Zechariah* 4:6; see J. HERTZ, *THE PENTATEUCH*

One thread binding the various topics discussed in this Article is that they all aim at promoting peace. For example, the emphasis of Jewish law on promoting compromise rather than litigation according to strict law was expressly for the reason of promoting peace.¹⁷³ The Talmudic rabbis sought to exclude lawyers from the litigation process because it was thought that they would interfere with the peaceful resolution of disputes.¹⁷⁴ The rabbis in the post-Talmudic period transformed the formalistic procedural rules so as to promote peace.¹⁷⁵ A community was to appoint men of compassion to be judges.¹⁷⁶ The Talmudic law shunned a competitive market.¹⁷⁷ And each member of the community had a duty to look out for the other members' welfare.¹⁷⁸ The religious practices and the belief structure of the Jews constantly reinforced these attitudes. During the ceremonies following the reading of the Torah in the synagogue, the congregation twice recites the verse from Proverbs, "Its ways are ways of pleasantness, and all its paths are peace."¹⁷⁹

CONCLUSION

For the reader who has travelled this far, it is obvious that a feminist jurisprudence based on Carol Gilligan's approach has much in common with Jewish law. Both emphasize responsibility and relationships instead of insisting on rights and adhering to strict law.

One implication of these similarities is that within Jewish law a common thread connects the procedure and substance. The entire body of Jewish law can be understood as pursuing the religious ideal of peace. In pursuing peace, a person recognizes the obligations to others within the community.

An implication of this study for the student of feminist jurisprudence is to question the assumption that certain values of peace, community, and responsibility derive from some feature of the female personality that is

AND HAFTORAHS 989 (2d ed. 1988).

Similarly, Jacob suggested that part of Joseph's inheritance would be increased because Jacob had won a military victory. Jacob told Joseph, "I assign to you one portion more than to your brothers, which I wrested from the Amorites with my sword and bow." *Genesis* 48:22. But the Talmud juxtaposed his claim with a verse in Psalms, "I do not trust in my bow; it is not my sword that gives me victory." *Psalms* 44:7. The Talmud resolved the tension by saying that by "sword and bow," Jacob meant prayer and supplication. TALMUD *Bava Batra* 123a.

173. See *supra* note 35 and accompanying text.

174. See *supra* text accompanying note 94.

175. See *supra* note 86 and accompanying text.

176. See *supra* text accompanying note 69.

177. See *supra* text accompanying notes 105-16.

178. See, e.g., *supra* text accompanying note 156.

179. J. HERTZ, *supra* note 70, at 193, 197. The verse is in *Proverbs* 3:17. The Talmud explains this verse to mean that the whole Torah was given to promote the ways of peace. TALMUD *Gitin* 59b. See A. KIRSCHENBAUM, *supra* note 36, at 152.

either natural or due to the psychological effect on boys and girls of being raised primarily by women in early childhood. Jewish law was developed almost exclusively by men, and there is no reason to doubt that Jewish men left the primary responsibility for raising young children to women.¹⁸⁰ It would seem, therefore, that the development of the values of Jewish law and feminist jurisprudence does not emanate from some natural difference between men and women. Feminists should conclude therefore that embracing values of connection, caring, and responsibility will not necessarily reinforce a stereotyping of women.

A second implication for feminist jurisprudence is that the mere fact that "a different voice" generates the law does not guarantee that the law will empower women. Jewish law protected women, and it imposed on men several obligations for the support and satisfaction of women. However, Jewish law also subordinated women.¹⁸¹ Men were obligated to provide for their wives' maintenance during and after marriage,¹⁸² to satisfy their wives' sexual desires,¹⁸³

180. In case of divorce, children—girls of all ages and boys under the age of six—were generally placed in the care of the mother. A divorced man could refuse to support his son over the age of six unless the son was placed in his custody. SHULHAN ARUKH *Even Ha-ezer* 82:7. It was generally considered better to have a son than to have a daughter. See, e.g., TALMUD *Berakhot* 31a; MIDRASH TANHUMA *Hayei Sarah*. But if the first child was a girl, this was a good sign because she could help raise the other children. TALMUD *Bava Batra* 141a. See generally 13 ENCYCLOPAEDIA JUDAICA *Parent and Child* 95, 98 (1972).

181. Maimonides says that a woman is to honor her husband greatly and look on him as a king or lord, she is to do whatever he tells her, and she is to follow his desires and stay away from what he hates. MISHNEH TORAH *Ishut* 15:20. For a critical view of the way Jewish law treated women see, for example, J. PLASKOW, *supra* note 29; L. SWIDLER, WOMEN IN JUDAISM: THE STATUS OF WOMEN IN FORMATIVE JUDAISM (1976); Adler, *The Jew Who Wasn't There: Halakhah and the Jewish Woman*, 7 RESPONSE 77 (Summer 1973), reprinted in S. HESCHEL, ON BEING A JEWISH FEMINIST 12 (1983); Hyman, *The Other Half: Women in the Jewish Tradition*, in THE JEWISH WOMAN 105 (E. Koltun ed. 1976). For a more sympathetic view see, for example, T. FRANKIEL, THE VOICE OF SARAH: FEMININE SPIRITUALITY AND TRADITIONAL JUDAISM (1990); M. MEISELMAN, JEWISH WOMAN IN JEWISH LAW (1978); Berman, *The Status of Women in Halakhic Judaism*, in THE JEWISH WOMAN, *supra*, at 114. For an effort to improve the status of women within traditional Jewish law, see B. GREENBERG, ON WOMEN AND JUDAISM (1981).

182. SHULHAN ARUKH *Even Ha-ezer* 70 (food); SHULHAN ARUKH *Even Ha-ezer* 73 (clothing).

183. SHULHAN ARUKH *Even Ha-ezer* 76. The obligation included the performance of intercourse on a regular basis, the frequency of which depended on the husband's ability to be at home. For example, regular laborers were obligated to provide their wives with sexual intercourse twice a week, laborers who worked in another city were only expected to have intercourse once a week. Scholars were also expected to have intercourse once a week. SHULHAN ARUKH *Even Ha-ezer* 76:2. These were minimum amounts that could be increased if the wife indicated her desire. SHULHAN ARUKH *Orah Hayim* 240:1. In addition, the husband was obligated to have intercourse on the night that his wife had gone to the ritual bath and on the night before he took an out-of-town trip. SHULHAN ARUKH *Even Ha-ezer* 76:4. A wife could prevent her husband from changing his employment if that would reduce the frequency of his obligation. SHULHAN ARUKH *Even Ha-ezer* 76:5. However, one could become a scholar without his wife's permission. SHULHAN ARUKH *Even Ha-ezer* 76:5. The Talmud recognized that women as well as men derive pleasure from sexual intercourse. See, e.g., TALMUD *Bava Kamma* 32a; TALMUD *Kidushin* 22b; RASHI ON TALMUD *Eruvin* 100b (comment beginning "Yiv'ol"). For purposes of liability for injuries caused during intercourse, only the husband was considered to be the active party and therefore liable. TALMUD *Bava Kamma* 32a.

and to treat their wives with respect.¹⁸⁴ But only men could become rabbis and judges.¹⁸⁵ Also, because the law obligated only men to testify as witnesses,¹⁸⁶ it generally allowed only men to serve as witnesses.¹⁸⁷ Similarly, because the law required only men to say certain prayers,¹⁸⁸ only men could make up the "minyan," or quorum necessary for community prayer, and only men could lead such prayers.¹⁸⁹ The law exempted women from the duty of studying Torah,¹⁹⁰ but society expected women to encourage men

184. The Talmud says that a man ought to love his wife as much as his own body and that he ought to honor her more than his own body. TALMUD *Ketubot* 62b; cf. *Epiphany*. 5:28 ("So ought men to love their wives as their own bodies. He that loveth his wife loveth himself."). Maimonides sums up the Talmudic rules by saying that a man is also to avoid being harsh or angry with his wife. He is supposed to speak pleasantly to her. He is also to spend as much money as he is able to for her welfare. MISHNEH TORAH *Ishut* 15:19.

A man was generally liable for any physical injury that he directly caused his wife. SHULHAN ARUKH *Even Ha-ezer* 83:1. A man was strictly liable for damages if he hurt his wife during intercourse. SHULHAN ARUKH *Even Ha-ezer* 83:2. A man was supposed to have intercourse with his wife only after talking with her and while both were happy. MISHNEH TORAH *Ishut* 15:17. He could not force his wife to have intercourse against her will. SHULHAN ARUKH *Even Ha-ezer* 25:2. Nor could he have intercourse if either party was angry with the other or if either party was drunk. SHULHAN ARUKH *Even Ha-ezer* 25:8-9. A man's intentions and thoughts during intercourse were not to increase his own pleasure but to fulfill his obligation to his wife and to his creator to bring children into the world who would study Torah and fulfill the commandments. SHULHAN ARUKH *Even Ha-ezer* 25:2.

185. See *supra* note 65; see also R. GORDIS, *THE DYNAMICS OF JUDAISM* 171-84 (1990) (arguing that although there were no women rabbis before the twentieth century the law should now change).

186. TALMUD *Shevuot* 30a.

187. SHULHAN ARUKH *Hoshen Mishpat* 35:14. See generally 16 ENCYCLOPAEDIA JUDAICA *Witness* 584, 586 (1972). The exclusion from testimony had a number of exceptions and qualifications. Jewish law made a firm distinction between pleading and testimony. Women could plead as parties, and parties were not allowed to testify in their own case. Cf. Enker, *supra* note 80, at 112 (distinguishing between pleading and testifying). The exclusion of women from testifying only applied to formal testimony. Women could provide the judges with information about the credibility of parties who were subject to an oath. TALMUD *Ketubot* 85a. In some cases involving only a religious prohibition but not money damages, the rabbis allowed the testimony of a single witness, even a female witness. See 2 TALMUDIC ENCYCLOPEDIA 252 (1976) (Hebrew). In some of these cases the testimony would benefit a woman. For example, the testimony of one witness that a married man had died was usually sufficient. SHULHAN ARUKH *Even Ha-ezer* 17:3-4. Similarly, a single witness could testify to the validity of a "halizah" ceremony, which freed a childless widow from having to marry her brother-in-law. SHULHAN ARUKH *Even Ha-ezer* 169:8. And the strict rule excluding their testimony was softened when no other witnesses were likely to be available. GLOSS OF MOSES ISSERLES TO SHULHAN ARUKH *Hoshen Mishpat* 35:14.

188. E.g., TALMUD *Berakhot* 20a-b (Women are exempt from having to say the "Sh'ma" and from having to put on tefilin.). Tefilin are a pair of boxes containing parchment scrolls of selected Biblical verses. During weekday morning prayers, one of the tefilin is worn on the head and the other is worn on the left bicep. See H. WOUK, *THIS IS MY GOD* 138 (1959).

189. SHULHAN ARUKH *Orah Hayim* 55:1 (ten men needed for "kaddish," "kedushah," and "barehu"); see A. WEISS, *WOMEN AT PRAYER: A HALAKHIC ANALYSIS OF WOMEN'S PRAYER GROUPS* 43-56 (1990); Berman, *supra* note 181, at 122.

190. SHULHAN ARUKH *Yoreh Deah* 246:6; TALMUD *Kidushin* 29b. As a result of this lack of obligation, there were periods when many Jewish women did not understand Hebrew at all. See TOSAFOT *Berakhot* 45b (comment beginning "Shani"). See also Baskin, *Jewish Women*

to study Torah.¹⁹¹ Jewish society treated women as being different from men. They were, at best, as one modern authority has put it, "separate but equal."¹⁹²

Catherine MacKinnon has suggested that women have adopted the values of the "different voice" because they have been oppressed by men.¹⁹³ She may be right. But the Jewish experience would suggest that oppression does not necessarily end when the males in society adopt the values of the different voice. The males in Jewish society dominated women despite the adoption by those males of the different voice in dealing with much of society and law.¹⁹⁴ The Jewish experience would suggest that the oppression of women in Western society may not be due to men's failure to speak with a different voice.

How does it happen that a legal system that is otherwise so much in tune with a feminist jurisprudence offends so much that is part of feminism? I cannot provide a full answer. Part of the answer may be that in ancient times child rearing and homemaking were activities that women pursued for most, if not all, of their adult lives. This left insufficient time for the study of Torah, and the study of Torah was central to Jewish male society.

Another part of the answer may be that any society that adopts a jurisprudence that emphasizes obligations and relationships must still determine who is to be a full member of the community. There will always be some who are unwilling or unable to participate fully in the community. Society might try to extend the boundaries of the community to include more types of people.¹⁹⁵ But at some point society has to exclude someone

in the Middle Ages, in *JEWISH WOMEN IN HISTORICAL PERSPECTIVE* 94, 106 (J. Baskin ed. 1991). Many modern authorities require Jewish women to be given a Jewish education in those areas relating to her tasks in the home. See M. MEISELMAN, *supra* note 181, at 39-41. There were exceptional instances of women who were learned in Jewish law. The most outstanding example is Beruryah who lived in the second century. See *supra* note 18. The Talmud also occasionally attributes legal arguments to Biblical women. For example, Hanna is said to have argued on legal grounds with God that she ought to bear a child. *TALMUD Berakhot* 31b. There was no objection to women teaching Torah. See *supra* note 65.

191. For example, the *TALMUD Berakhot* 17a teaches that the reward promised to women is greater than that given to men. Why? Because they send their sons to the synagogue to learn Torah, send their husbands to the house of study to learn Mishna, and wait for their husbands until they return from the academy.

192. A. STEINSALTZ, *THE ESSENTIAL TALMUD* 144 (1976); see also M. FEINSTEIN, 6 *IGROT MOSHE* 80 (1982/83) (In this responsum concerning women's liberation, Rabbi Feinstein maintains that women and men have equal degrees of holiness but that women are naturally better suited to raise children, which is the most important work as far as God and Torah are concerned.).

193. See *supra* note 8.

194. Cf. D. RHODE, *JUSTICE AND GENDER* 312 (1989) (making a similar observation about women in Japanese society).

195. See M. MINOW, *MAKING ALL THE DIFFERENCE* (1990).

or something from full membership. Some people will lack the resources of time or money necessary to participate actively in the community's affairs. Others will lack the maturity, experience, or commitment to the society's values to be able to assume all of the responsibilities and rights of being a full member. Within Jewish society women did not generally have the time necessary to commit to a rigorous study of Torah.

These are not satisfying answers because one might wonder why adult Jewish males did not share child rearing with women and allow them to take an equal role in Torah study. It seems that the social forces that kept women in the role of primary care giver and homemaker overcame the communitarian spirit of the law. But in any society, as economic and social conditions change and as people's concepts of equality and difference evolve, the social status of its members is likely to change. When this occurs, what once seemed natural or acceptable may no longer be.

To return to MacKinnon's point, it is possible that the different voice within Jewish law may have developed because of oppression by outside forces. Jews were systematically discriminated against during the period when these values developed. The oppression forced the members of the community to look primarily to the community for support and care. But even if oppression was the cause of the development of these values, one can still determine that the values are good ones.

The more difficult issue is whether these values can be implemented in a legal system in the absence of oppression. As the systematic oppression of Jews in Western Europe eased after the eighteenth century and as Jews there came to see themselves as citizens of the countries in which they lived, the Jewish legal system underwent a dramatic decline. Moreover, the history of Jewish law suggests that the communitarian ideals of Jewish law were frequently in competition with other models of behavior. Jewish courts increasingly handled cases brought by lawyers. Jews found ways to circumvent the prohibition of charging interest to other Jews. And as Jews resorted to non-Jewish courts for relief, the values inherent within Jewish law were not always observed. But it would seem that oppression is not necessary for the development of these values. What is necessary is a commitment to communal values. When the society at large does not share these values, what is needed is a commitment to separate from the society at large. Oppression can make it possible for a group to develop that commitment, but that commitment can also be generated internally. Developing that commitment and sustaining it in the face of opportunities to develop more selfish forms of behavior is no easy task.¹⁹⁶

196. See also Williams, *Feminism's Search for the Feminine: Essentialism, Utopianism, and Community*, 75 CORNELL L. REV. 700, 708 (1989) (Communitarianism can devalue diversity.).

An important distinction between rabbinic law and feminist jurisprudence is that the former is a religious legal system while the latter is secular. The religious dimension of Jewish law has helped to sustain it over much of the past two thousand years. Also, because of their religious authority, individual rabbis were often able to lead the people and impose a structure of communal values on them. On the other hand, as Jews in the modern world increasingly found themselves alienated from the older forms of organized religion, the ability of Jewish law to function declined. The challenge for a feminist jurisprudence will be to promote and sustain its values in a hostile environment without the advantages and disadvantages of being tied to a religious movement.

